

175

UNITED STATES DISTRICT COURT IN
DISTRICT OF COLUMBIA

IN RE: ESTATE OF ADMINISTRATOR OF THE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT

(94,216)

(25,316)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 495.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN
ERROR,

vs.

CHARLES M. HADLEY, AS ADMINISTRATOR OF THE
ESTATE OF CHARLES M. CRADIT, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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No. 18439.

HADLEY
v.
UNION PACIFIC R. Co.

Pleas Before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 3d Day of January, 1916.

Present: Hon. Andrew M. Morrissey, Chief Justice; Hon. John B. Barnes, Judge; Hon. Charles B. Letton, Judge; Hon. Jacob Fawcett, Judge; Hon. William B. Rose, Judge; Hon. Samuel H. Sedgwick, Judge; Hon. Francis G. Hamer, Judge.

Attest,

H. C. LINDSAY, *Clerk.*

2 Be it remembered: That on the 29th day of December, 1913, there was filed in the office of the clerk of the Supreme Court of the State of Nebraska in the case of Charles M. Hadley, administrator of the estate of Charles M. Credit, deceased, plaintiff and appellee, vs. Union Pacific Railroad Company, defendant and appellant, the same being an appeal from the district court of Cheyenne County in said state, a certain transcript of the record and proceedings in the trial of said case in said district court; that the following are true and correct copies of the pleadings, orders, motions, instructions and proceedings mentioned in the præcipe filed in the office of the clerk of said supreme court by the Union Pacific Railroad Company on its appeal to the Supreme Court of the United States, directing which portions of said transcript shall be incorporated in this transcript as the same appear in the transcript so filed in the office of the clerk of the supreme court on said December 29, 1913.

3 Be it remembered, that, heretofore, to-wit, on the 17 day of July, 1913, a petition was filed in the office of the Clerk of said Court, in the words and figures, following, to-wit:

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Credit, Deceased, Plaintiff,
vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Petition.

The Plaintiff complains of the Defendant and for cause of action, alleges:

1.

That on the morning of the 14 day of March, 1913, Charles M. Cradit departed this life, in the manner, hereinafter fully set forth. And that this Plaintiff, Charles M. Hadley, was, by the County Court of Cheyenne County, Nebraska, the Court of competent jurisdiction, on the 13 day of June, 1913, duly appointed Administrator of the estate of said Charles M. Cradit; that he duly qualified; Letters of Administration were issued to him and that he is now, the duly acting and qualified Administrator of said estate.

2.

That the Defendant, the Union Pacific Railroad Company, is a corporation, organized and existing, under the laws of the State of Utah and is engaged in the business of carrying freight and passengers, by railroad, for hire, to and from Omaha, Nebraska, through the States of Nebraska, Colorado, Wyoming and Utah.

4 And that the said Defendant was so engaged, in interstate commerce, as a common carrier, by railroad, on the 13 and 14 days of March, 1913.

3.

That on the 13 day of March, 1913, the deceased, Charles M. Cradit, was employed by and worked for the said Defendant, as a Brakeman, in its business of interstate commerce and that at said date, said deceased resided in the City of Sidney, Nebraska and was employed in said business of interstate commerce, as a brakeman on trains, running from the City of Sidney, Nebraska, to the City of Cheyenne, in the State of Wyoming.

4.

That on March 13 and 14, 1913, a blizzard raged, in Western Nebraska and particularly, between Sidney, Nebraska and Cheyenne, Wyoming; that the wind blew with such a velocity, that it was impossible for a man to walk and make headway, against it; that a heavy snow was falling and blowing and drifting, to such an extent, that it was impossible to see more than fifty feet, through said storm, during said 13 and 14 days of March, 1913 and that by reason of said blizzard and the conditions then prevailing, it became and was dangerous and unsafe to run and operate railroad trains, in such a manner, that one followed the other, closer than the distance between telegraph stations, on said railroad.

5.

That the trains on that portion of Defendant's-railroad, situated between Sidney, Nebraska and Cheyenne, Wyoming, was, on said

13 and 14 days of March, 1913, operated and controlled, by the train dispatcher, at Sidney, Nebraska, who was fully aware of the condition of the weather and the dangers which might result, thereby, to the operation of trains.

6.

Plaintiff further alleges, that on the evening of March 13, 1913, the deceased, Charles M. Cradit, was called to go out, as Brakeman, upon a freight train, from Cheyenne, Wyoming, to Sidney, Nebraska;

that he responded to such call and that, at about ten minutes past six o'clock P. M., of March 13, he left said

City of Cheyenne, Wyoming, as rear Brakeman, on a freight train, known as Extra 504 East, loaded with interstate freight, consigned to various stations, outside of the State of Wyoming.

7.

That at the time said deceased left the City of Cheyenne, it was raining and snowing and the wind blowing with great velocity and that said storm continued to increase, in severity, as said train proceeded, on said railroad, East; that so severe had said storm become, that when said train arrived, at Dix, Nebraska, a station on said road, said train was run in, upon a side track and the condition of the weather and the difficulties of proceeding with safety, with said train, farther, reported by the Conductor of said train, Ray C. Phillips, to W. A. Borton, Train Dispatcher, at Sidney, Nebraska.

8.

This Plaintiff further alleges, that while at the station of Dix, Nebraska, freight train, known as Extra 501 East, bound from Cheyenne, Wyoming, to Sidney, Nebraska, came up on the main track, along deceased's train, Extra 504 East and that both of said trains were present, at said station of Dix, at the same time. All of which, was known to the Train Dispatcher, at Sidney, Nebraska, in charge of and operating said trains.

9.

Plaintiff further alleges, that said Train Dispatcher, W. A. Borton, regardless of his duties to the deceased and other employees of said Defendant, Company and the passengers of said train and with full knowledge of the conditions of the weather and the dangers incident to operating trains, in such a blizzard, wilfully, carelessly and negligently, ordered Train Extra 504 East, to proceed East, to Sidney and immediately, thereafter, with full knowledge of the conditions of the weather and the dangers incident to operating trains, in such a blizzard, wilfully, carelessly and negligently and unlawfully, ordered Train Extra 501 East, to proceed on, to its destination, over said railroad, to Sidney, Nebraska and to follow Train Extra 504 East, in close proximity.

10.

Plaintiff further alleges, that G. D. Sage, is an officer of Defendant, Corporation, known, as Assistant Superintendent of the Fourth District, the same being the District between Sidney, Nebraska and Cheyenne, Wyoming; that as such officer, he had charge of the making up and sending out of trains, from the terminals, of Sidney and Cheyenne; that on the morning of March 14, 1913, he was present, in Sidney and was fully cognizant of the blizzard, raging, at that time, between Sidney and Cheyenne and the dangers incident to the operation of trains, caused by such blizzard and that regardless of his duties to the employees of said road operating trains and to passengers, thereon, he wilfully, carelessly and negligently, ordered Train, known as Extra 510 West, made up and ordered it to proceed, from Sidney, Nebraska, to Cheyenne, Wyoming, on said railroad; that said train was a freight train and left Sidney, Nebraska, at 1.10 A. M., on the morning of March 14, 1913; that so severe was said blizzard, that said train consumed one hour and fifty-five minutes, in going from Sidney, to Mile Post 426, a distance of about eleven miles. And that when said Train Extra 510 West, arrived at said Mile Post 426, the engine hauling said train, was out of water and was compelled to abandon said train and the Dispatcher, at Sidney, Nebraska, was so notified, by the engineer of said engine, whose name is unknown to the Plaintiff, herein. That on said 13 and 14 days of March, 1913, the Station, known as Mile Post 426, was the end of the double track, from Sidney, West and situated twelve miles, West of Sidney. That there was, at that time, a telegraph station, located there, and, also, there stationed, a telegraph operator, both at day and night time and that said W. A. Borton, Dispatcher, as aforesaid, was notified of the conditions of the engine of Extra 510 by the said Telegraph Operator, at Mile Post 426. That when said Dispatcher was notified of the condition of said engine, he wilfully, carelessly and negligently and without regard to the safety of the employees of said Defendant, Company or the passengers riding on its said train, issued an order to train Extra 504, to stop at Mile Post 426 and take the engine, which had been drawing Extra 510 West and which, was incapacitated, by reason of the fact, that it was out of water, back to Sidney, Nebraska, notwithstanding the fact, that he had ordered Train Extra 501 East, to follow 504 and knew that it was following said 504 in close proximity and knew, that by reason of the conditions of the weather and the blizzard, raging, at said time, it was difficult for the men operating said train, to see the signals and to give and take signals, in the operation of the said train.

11.

Plaintiff further alleges, that the Engineer of Train Extra 504 East, James Zolesky, then reported to the said Train Dispatcher, the

condition of the weather, the difficulties encountered, in giving and taking signals and asked said Train Dispatcher, to be permitted to proceed, to Sidney, without picking up Engine 510 and attaching it to his train. That said Train Dispatcher, W. A. Borton, with full knowledge of the severity of the blizzard, raging and the difficulties of giving and taking signals and with full knowledge, that Train Extra 501, was following Train Extra 504, in close proximity, wilfully, negligently and unlawfully and with a wanton disregard for the safety of the employees of said train and the passengers thereon, refused such permission and ordered said Train Extra 504, to stop and pick up Engine 510 and to take the same, to Sidney, Nebraska.

"All of which said Trains, to-wit, Extra 501 East, Extra 504 East and Extra 510 West, were running without headlights, because the severity of the storm was such, that the acetylene head lights, on said engine, could not be kept lit."

8

12.

Plaintiff further alleges, that the Defendant, Company, on the 13 and 14 days of March, 1913, as aforesaid, had installed, on its said railroad, between Sidney, Nebraska and Cheyenne, Wyoming, a system of signals, known as block signals, by which, in the night season, a red light is always displayed, in the rear of each moving train, at various distances, therefrom, but always at sufficient distance, to enable the engineer of one train following another, to stop, before striking the preceding train. That the rules of said Defendant, Company, prohibit and forbid an engineer, from running by or past a red signal light or from running by or past a signal, that does not display a green signal light, that being the signal, that the track is clear. That on the night in question, there was a signal to the rear of Train Extra 504, at sufficient distance to enable the engineer of Train 501, to stop said Train, before colliding with Train 504.

13.

Plaintiff further alleges, that Train Extra 504 East, was a freight train and then, being operated East of Potter, to Mile Post 426 and at the point where the accident herein described, occurred, was outside of the yard limits. That the Defendant herein, negligently, carelessly and wantonly, failed and neglected to take on the Conductor of Train 501, at Potter and negligently, carelessly and wantonly, proceeded with said Train, from Potter, Nebraska, to Mile Post 426 and to the point, where the accident described herein, occurred. That it is the duty of the conductor of said train, to observe the block signals, stationed along said railroad and that by so leaving said conductor, at Potter and operating its said train, as aforesaid, without said conductor, it deprived the said train of the care and management of said conductor, thereby endangering the lives of the employees of said Defendant and the passengers riding on said train.

Plaintiff further alleges, that on the night in question, to-wit, the night of March 13 and 14, 1913, said Train 501, negligently operated, as aforesaid, without a conductor and without a head light, carelessly and negligently, failed and neglected to observe the signals, immediately to the rear of Extra 504 East and carelessly and negligently, ran on and into the rear of Train 504, thereby demolishing and destroying the caboose of said Train Extra 504, in which, deceased, Cradit, was, at the time of said accident and thereby causing his immediate death. That the death of Charles M. Cradit was caused by the negligence of the Defendant, Company and of its employees, through the grossly, negligent manner and method of ordering out, dispatching and operating said trains, as aforesaid, on said 13 and 14 days of March, 1913.

The Plaintiff further alleges, that the said Charles M. Cradit, at the time of his death, was thirty-one years of age, was in sound health of body and mind, of temperate and industrious habits, was capable of earning and was earning, at said time, the sum of \$110.00 per month. That he left surviving him, his widow, Edith Cradit and the following named children, to-wit:—

Violet B. Cradit, aged five years and Grace Cradit, aged two years, for whose benefit this action is prosecuted and no others. And that said widow and children, were solely, dependent, upon the said Charles M. Cradit, for their support and maintenance and that they have sustained damages, by reason of the aforesaid wrongful acts, neglects and defaults of the said Defendant, causing the death of the said Charles M. Cradit, in the sum of \$50,000.00 and that this suit is brought, on behalf of and for the benefit of said Edith Cradit, Violet B. Cradit and Grace Cradit, by the Plaintiff, herein.

Wherefore, Plaintiff herein, prays for judgment, against the Defendant, for the sum of \$50,000.00 and costs of suit.

DEVOE & SWENSON,
WILCOX AND HALLIGAN,
Attorneys for Plaintiff.

STATE OF NEBRASKA,
Cheyenne County, ss:

Charles M. Hadley, being first duly sworn, deposes and says, that he is the Administrator of the estate of Charles M. Cradit, deceased, and the Plaintiff herein and that he has read the foregoing petition and that the allegations therein contained, are true, as he verily believes.

CHARLES M. HADLEY.

Subscribed in my presence and sworn to before me, this 17 day of July, 1913.

[SEAL.]

H. T. DORAN,
Clerk District Court.

And afterwards, on the 2 day of August, 1913, there was filed in the office of the said Clerk, a certain Answer, in words and figures, following, to-wit:—

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Answer.

Comes now the Defendant and for answer to the petition of the Plaintiff, filed herein, states:—

1.

Admits, that Charles M. Cradit, departed this life, on the morning of the 14 day of March, 1913.

11

2.

Admits, that this Defendant is a corporation, organized and existing under the laws of the State of Utah, and is now, and was on the 13th and 14th days of March, 1913, engaged in the business of carrying freight and passengers, by railroad, for hire, to and from Omaha, Nebraska, through the States of Nebraska, Colorado, Wyoming and Utah.

3.

Admits that on the 13th day of March, 1913, the deceased, Charles M. Cradit, was employed by, and worked for, this Defendant as a Brakeman.

4.

Admits that on the evening of March 13, 1913, the deceased, Charles M. Cradit, was called to go out, as a Brakeman, upon a freight train from Cheyenne, Wyoming to Sidney, Nebraska; that he responded to such call and left said City of Cheyenne, Wyoming, at about the hour of 6:10 P. M. of said 13th day of March, 1913, as rear brakeman of a freight train known as Extra 504 East.

5.

Admits that freight train known as Extra 501 East bound, from Cheyenne, Wyoming to Sidney, Nebraska, and freight train known as Extra 504 East were present at the station of Dix, Nebraska at the same time, during the trip of Extra 504 East, hereinbefore referred to.

6.

Admits that train known as Extra 510 West, was a freight train, and left Sidney, Nebraska, west bound, at about 1:10 A. M. on the morning of March 14, 1913.

7.

Admits that on said 13th and 14th days of March, 1913, the station known as Mile Post No. 426 was the end of the double track from Sidney West, and was situated about 12 miles west of Sidney; admits that, at that time, there was a telegraph station located there, and also a telegraph operator; admits that on the morning of March 14, 1913, an order was issued to train Extra 504 East to stop at Mile Post 426 and take the engine which has been drawing 504 West, back to Sidney, Nebraska.

8.

Admits that on the 13th and 14th days of March, 1913, Defendant had installed on its said railroad, between Sidney, Nebraska, and Cheyenne, Wyoming, a system of signals known as "Block signals," by which, in the night season, a red light is always displayed in the rear of each moving train at various distances therefrom.

9.

Admits that on the night of March 13th and 14th 1913, train Extra 501 East ran on and into the rear of train Extra 504 East, near Mile Post 426, thereby demolishing the caboose of said train Extra 504, in which the deceased, Charles M. Cradit was at the time of said accident, and that the said Charles M. Cradit died as a result of said collision.

10.

Denies each and every allegation in said petition contained not herein specifically admitted to be true.

11.

Further answering said petition, this Defendant alleges that the injuries to, and death of, the said Charles M. Cradit, were due solely and exclusively to his own carelessness and negligence, and not to

any carelessness or negligence upon the part of this Defendant, and were due solely and exclusively to dangers and risks which were open, apparent and known to the said Charles M. Cradit, were incident to his employment and assumed by him.

12.

This Defendant alleges that the Plaintiff herein, does not have sufficient capacity to prosecute this action herein.

Wherefore, this Defendant, having fully answered, prays that it may be dismissed hence, and have judgment against Plaintiff for its costs herein expended.

13 UNION PACIFIC RAILROAD COMPANY,
By MILES & McINTOSH,
EDSON RICH,
A. D. ELICK,
 Its Attorneys.

STATE OF NEBRASKA,
County of Douglas, ss:

A. G. Ellick, being duly sworn, on oath deposes and says that he is one of the duly authorized Attorneys for the Defendant in the foregoing action; that he has read the foregoing answer, knows the contents thereof, and that the statements therein are true as he verily believes.

A. G. ELICK.

Subscribed in my presence and sworn to before me this 1st day of August, 1913.
[SEAL.]

JOHN A. BENNEWITZ,
Notary Public.

Commission expires Jan. 17, 1918.

And afterwards, on the 7 day of August, 1913, there was filed in the office of the said Clerk, a certain Reply, in words and figures, following, to-wit:

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,
vs.

UNION PACIFIC RAILROAD COMPANY.

Reply.

Comes now the above named Plaintiff in the above entitled action and for reply to the Answer of the Defendant filed herein, denies each and every affirmative allegation therein contained.

14 CHARLES M. HADLEY,
Administrator of the Estate of Charles M. Cradit, Deceased,
By DEVOE & SWENSON,
WILCOX & HALLIGAN,
 His Attorneys.

And afterwards, on the 29 day of September, 1913, there was filed in the office of the said Clerk, a certain Motion to Amend Petition, in words and figures, following, to-wit:

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Motion.

1.

Comes now the Plaintiff in the above entitled case and asks leave to amend his petition, by interlineation, in the following particular, to-wit, that he be permitted to add to the end of Paragraph Eleven, the following:

"All of which said trains, to-wit, Extra 501 East, Extra 504 East and Extra 510 West, were running without head lights, because the severity of the storm, was such, that the acetylene head lights on said engine-, could not be kept lit."

2.

That Plaintiff be permitted to amend Paragraph Fifteen, by adding thereto:

"And that this suit is brought on behalf of and for the benefit of said Edith Cradit, Violet B. Cradit and Grace Cradit, by the Plaintiff herein."

15

3.

And to amend Paragraph 14, by inserting in the third line, after the words, "Without a conductor," the words, "And without a head light."

4.

And to amend Paragraph 14, by changing the word, "Train," in next to the last line of said Paragraph to the word, "Trains," so that the same will read, "Dispatching and operating said trains."

DEVOE & SWENSON,

WILCOX & HALLIGAN,

Attorneys for Plaintiff.

That on the 29 day of September, 1913, that being the first day of the September, A. D. 1913, Term of Court, were had and done the following proceedings herein, as appears upon Court Journal 6, at Page 337.

Journal Entry.

CHARLES M. HADLEY, Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Defendant.

On Motion to Amend Petition.

And now on this 29 day of September, 1913, this cause came on to be heard, upon the petition of the Plaintiff, to be permitted to amend, by interlineation, Paragraphs Eleven, Fifteen and Fourteen, of Plaintiff's petition and the Court being fully advised in the premises, doth grant to the Plaintiff, permission to amend Paragraphs Eleven, Fifteen and Fourteen, in his said petition, as in his 16 said motion specified.

To which ruling of the Court, Defendant excepts to so much thereof as permits Plaintiff to amend Paragraph Eleven of said petition.

H. M. GRIMES, *Judge*.

That on the 30 day of September, 1913, that being the second day of the September, A. D. 1913, Term of Court, were had and done the following proceedings herein, as appears upon Court Journal 6, at Page 338.

Journal Entry.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Order and Jury Impaneled.

And now, on this 30 day of September, 1913, this cause came on to be heard, on the application of the Defendant herein, to permit its answer, now on file, to stand, as its answer to Plaintiff's petition, as amended and the Court being fully advised in the premises, it is so ordered.

Whereupon, came the parties and their Attorneys and also, twelve men, having the qualifications of Jurors, to-wit:

C. J. Hellwig, Peter Beckman, Jacob Bruns, S. T. Watson, Emory Planck, Andrew Nelson, Ed Root, Joseph Johnson, Frank Heinzman, C. O. Hade, Albert Juedes, W. W. Chowins, who were duly impaneled and sworn, according to law, to try this cause. And Counsel having made th-ir opening statements to the Jury and the hour of six o'clock P. M., having arrived, the Court having duly cautioned the Jury, not to talk or converse with any one, with reference to said cause, nor permit others to converse, concern-

17 ing said cause, in their presence, nor to converse among themselves, concerning said cause, court was adjourned until October 1, 1913, at 9 o'clock A. M.

H. M. GRIMES, *Judge*.

And afterwards, on the 4 day of October, 1913, there was filed in the office of the said Clerk, certain Instructions to Jury, in words and figures, following, to-wit:

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Instructions to Jury.

1.

That Court instructs the Jury that in this action the Plaintiff *beings* suit against the Defendant and for cause of recovery the Plaintiff alleges in his petition that Charles M. Cradit departed this life on March 14, 1913; that on June 13, 1913, the Plaintiff was duly appointed Administrator of the estate of said Charles M. Cradit, and that he duly qualified as such Administrator and is now the duly acting and qualified Administrator of said estate.

That the Defendant, the Union Pacific Railroad Company, is a corporation organized and existing under the laws of the State of Utah and is engaged in the business of a common carrier by railroad through Nebraska, Colorado, Wyoming, and Utah, and was so engaged on March 13th and 14th, 1913.

18 That on said days said Charles M. Cradit was employed by and worked for Defendant as a Brakeman, residing in Sidney, Nebraska.

That on March 13th and 14th, 1913, a blizzard raged between Sidney and Cheyenne, Wyoming.

That the wind blew with such velocity that a man could not walk and make any headway against it, heavy snow was falling and drifting so that one could not see more than fifty feet through it, and by reason of such storm it was dangerous to run trains closer than the distance from one telegraph station to another on said railroad.

That the trains on Defendant's railroad between Sidney and Cheyenne on March 13th and 14th, 1913 were operated and controlled by a train dispatcher at Sidney who knew the condition of the weather and the dangers in operating trains in such weather.

That the said Brakeman, Charles M. Cradit, left Cheyenne at about 6:10 P. M. on March 13th as rear Brakeman on the freight train known as Extra 504, loaded with freight consigned to various stations outside of Wyoming and East of Cheyenne.

That it was raining and snowing when the deceased left Cheyenne,

and the said storm continued to increase as the said train proceeded East; that when said train reached Dix, a station on Defendant's road, said train was upon a side track, and the condition of the weather and the difficulty of proceeding with said train in safety was reported to W. A. Borton, the Train Dispatcher at Sidney, by Ray C. Phillips, the Conductor of said train.

That while at said station of Dix, freight train known as Extra 501, bound East, came in on the main track beside the train of the deceased, all of which was known to the Train Dispatcher at Sidney.

Plaintiff further alleges that said Dispatcher, W. A. Borton, with full knowledge of the weather and the dangers incident to operating trains in such a storm as was then on, wilfully, carelessly, and negligently ordered train Extra 504 to proceed East to Sidney, and

19 immediately thereafter wilfully, carelessly and negligently ordered train Extra 501 to proceed East to Sidney following and in close proximity to said train Extra 504.

Plaintiff further alleges that G. D. Sage is an officer of Defendant and known as Assistant Superintendent of the Defendant's road between Sidney and Cheyenne, and had charge, as such officer, of the making up and sending out of trains from Sidney and Cheyenne.

That on the morning of March 14, 1913, said Sage was in Sidney, knew the severity of the storm then raging, knew the dangers of operating trains in such a storm as was then raging, yet he wilfully, carelessly, and negligently ordered train known as Extra 510 to be made up and proceed West from Sidney to Cheyenne on Defendant's road; that said train was a freight and left Sidney at 1:10 A. M. on March 14, 1913.

That because of the severity of the storm said train consumed one hour and fifty-five minutes going from Sidney to Mile Post 426, a distance of about eleven miles; that when said Extra 510 arrived at said Mile Post 426 the engine was out of water and was compelled to abandon the train; that the Dispatcher at Sidney was so notified by the engineer.

Plaintiff alleges that at that time Mile Post 426 was the end of the double track on Defendant's said road; that there was at that time a telegraph station with a telegraph operator then located at said Mile Post and said Dispatcher, W. A. Borton, was notified of the condition of the engine drawing Extra 510 by the operator at said Mile Post; that said Dispatcher ordered train Extra 504 to stop at said Mile Post, to pick up said engine and bring it with his train to Sidney, well knowing that he ordered Extra 501 East to follow Extra 504 into Sidney, and knowing that said trains were running in close proximity to each other and that it was difficult for the men operating the trains to see, give and take signals, because of the storm then raging.

20 Plaintiff alleges that James Zolesky, who was Engineer of Train Extra 504, running East, then reported to the Train Dispatcher the condition of the weather, the difficulties in giving and taking signals, and asked said Dispatcher to be permitted to come on to Sidney without picking up the engine on train Extra

510, and the Dispatcher refused such permission and ordered said engine to be brought to Sidney with train Extra 504.

Plaintiff further says that at said time in March the Defendant had on its road what is known as block signals, by which a red light is always displayed in the rear of each moving train at various distances therefrom, but such distance as to enable the engineer of one train following another to stop before striking a train in front.

That the rules of Defendant prohibited the running by a red signal or passing a signal that did not show green.

That on the night in question there was a signal to the rear of train Extra 504 at sufficient distance to enable the engineer of train Extra 501 to stop before colliding with train Extra 504.

That in taking the train Extra 501 East from Potter to Mile Post 426 the Defendant carelessly and negligently proceeded without the conductor of the train.

That by so carelessly running, said train Extra 501, without a conductor, without a head light, and without observing the signals, carelessly and negligently ran into the rear of train Extra 504, destroying and demolishing the caboose attached to said train, and thereby causing the death of the said Charles M. Cradit, who was in said caboose at the time of said collision.

Plaintiff alleges that said Charles M. Cradit at the time of his death was thirty-one years of age, sound in body and mind, temperate and industrious, and was capable of earning and was earning \$110.00 per month; that he left surviving him his wife, Edith Cradit,

21 Cradit, aged two years; that said wife and children were wholly dependent upon the said Charles M. Cradit for their support and maintenance, and by reason of his death being caused by Defendant's said alleged negligence and carelessness they have sustained damages in the sum of \$50,000.00, and for whose benefit this action is brought and for which sum the Plaintiff asks judgment.

2.

The Defendant by its answer admits the death of Charles M. Cradit on March 14, 1913; admits that Defendant was and now is a corporation organized under the laws of Utah; was and now is engaged in carrying freight and passengers by railroad for hire to and from Omaha, Nebraska, through Nebraska, Colorado, Wyoming, and Utah; that the deceased, Charles M. Cradit, was employed by and working for the Defendant as a Brakeman on March 13, 1913; that on that night he was called out as a Brakeman upon a freight train from Cheyenne to Sidney; that he responded to said call and left Cheyenne about 6:10 P. M. on March 13, 1913, as rear Brakeman of Freight train Extra 504 East.

Defendant admits that train Extra 501 East bound from Cheyenne to Sidney, and freight train Extra 504, East bound, were at Dix at the same time during the trip; admits that train Extra 510 was a freight train West bound and left Sidney about 1:10 A. M., March 14, 1913; admits that on March 13th and 14th, 1913, that

Station Mile Post 426 was the end of the double track from Sidney West and was about twelve miles West from Sidney; admits that at that time there was a telegraph station and telegraph operator located there, and that on March 14, 1913, an order was issued to train Extra 504 East, to stop at Mile Post 426 and take the engine that had been drawing Extra 510 West, back to Sidney; admits that on March 13 and 14, 1913, the Defendant had installed on its road a system of signals known as block signals, by which a red light is always displayed in the rear of each moving train at various distances therefrom in the night season; admits that on the night of March 13th and 14th train Extra 501 East ran into the rear of train Extra 504 East, near Mile Post 426, thereby demolishing the caboose of train Extra 504, in which the said Charles M. Cradit was at the time of said collision, and that he died as the result of said collision.

Defendant further answering denies each allegation in Plaintiff's petition contained except as in its answer admitted.

Defendant, further answering, alleges that the injuries to and the death of said Charles M. Cradit were due solely to his own carelessness or negligence,—to the dangers and risks which were to him open, apparent and known to be incident to his employment, and assumed by him.

Defendant asks that this action be dismissed and that it recover its costs.

3.

The Plaintiff, for reply to Defendant's answer, denies each and every allegation therein contained.

4.

The petition and reply of the Plaintiff and the answer of the Defendant are called the pleadings, and they are the written statements made by the parties in the action of the facts constituting *there* respective claims and defences.

By Instruction No. 1 is set out in substance Plaintiff's written claims of his right to recover herein.

In Instruction No. 2 is set out the Defendant's written claims of defense; and Instruction No. 3 sets out Plaintiff's written claim, reply or answer to Defendant's written defense set out in its answer.

5.

The gist of Plaintiff's action is that the death of Charles M. Cradit was caused by the negligence of the Defendant Railroad Company in the operation of its trains on its tracks at or near what was called Mile Post 426 on the night of March 13 and 14, 1913.

23 Facts which are alleged by one party and admitted by the other in the pleadings do not require any proof; so that the negligence of the Defendant, and that such negligence was the cause of the injury to Charles M. Cradit that resulted in his death, and that

his death was not the result of his own negligence, are among the decisive question- for you to pass upon in this case.

It rests upon the Plaintiff to prove by a preponderance of the evidence the facts necessary for his recovery; that is, that the death of Charles M. Cradit resulted from an injury inflicted upon him by the Defendant Railroad Company in the negligent and careless operation of its railroad in running its trains at the time and place set out in the petition.

If the Plaintiff establishes this fact by a fair preponderance of the evidence, then the burden will rest upon the Defendant to establish by a fair preponderance of the evidence that the negligence and carelessness of the said Charles M. Cradit was the proximate cause of the injury that resulted in his death, or that his negligence contributed to his injury and death.

6.

This action is brought under what is called the Employers' Liability Act, a law passed by the United States Congress, which law provides that every common carrier by railroad, while engaged in commerce between any of the several states, shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of the death of such employee to his personal representative for the benefit of the surviving widow and children of such employee, for such injury or death, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, or other equipment.

24 That in all actions brought against any such common carrier by railroad, under this act, to recover damages for personal injuries, or where such injuries result in his death, the fact that such employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such

7.

Negligence, as defined by law, is the failure to exercise such care, forethought and prudence as under the circumstances surrounding the case, as they appear in evidence, duty requires that reasonable men should have exercised.

Contributory negligence, as defined by law, is a want of ordinary care on the part of the one injured, which contributes to the happening of the injury complained of.

Reasonable and ordinary care, as applied to any case, is that degree of care which a person of ordinary prudence would exercise under like circumstances. It is that degree of care which a person of ordinary prudence would exercise under the same circumstances; and negligence is the doing of that which an ordinarily and reasonably prudent person would not do, or the omitting of the care or precaution that an ordinarily prudent person would not omit.

8.

By a preponderance of the evidence is meant, not the greater number of witnesses, but the greater weight of the evidence as arrived at by the jury after a careful consideration of all the evidence introduced in the case.

9.

*You, Gentlemen of the Jury, are the sole judges of the weight of the evidence and the credibility of the witnesses. In passing upon the credibility of witnesses, it is your duty to take into consideration their appearance upon the witness stand, their manner of testifying, their interest or lack of interest, if any, in the result of the suit, their distinctness of recollection, means of knowledge, the probability or improbability of the truth of their statements, and the extent to which they have or have not been corroborated by the testimony of the other witnesses or by facts or circumstances admitted or proven upon the trial.

10.

If, under the evidence and these Instructions, you find for the Plaintiff, then I charge you that the measure of the damages, the amount Plaintiff is entitled to recover, is such sum as will compensate the widow and minor children of the deceased Charles M. Cradit, in whose behalf the Plaintiff sues, for the pecuniary loss, if any, that they may have suffered by reason of the death of said Charles M. Cradit, less such sum, if any, you find such damages should be diminished by reason of contributory negligence on the part of the said Charles M. Cradit. The law does not permit the recovery of remote or speculative damages, or damages as punishment. In determining what the amount of the recovery should be, you are entitled to take into consideration the occupation of the deceased, his earning capacity at his occupation, and the reasonable probability, as shown by the evidence, of his future earnings; and in this connection you are entitled to consider the Carlisle Tables of Expectancy introduced in evidence and showing the reasonable expectancy of life of a healthy person of the age of thirty-one years to be 33 and 68/100 years.

11.

The deceased, Charles M. Cradit, left surviving him his widow, Edith Cradit, and two children, Violet M. Cradit, aged five years, and Grace Cradit, aged two years. This action is brought by Plaintiff, on behalf of the said widow and children.

If under the evidence in this case you find for the Plaintiff, then you are required, under the law under which this action is brought, to find and return by your verdict how much of the total sum you

find Plaintiff shall recover shall be for the benefit of the widow, Edith Cradit; how much shall be for the child Violet B. Cradit, and how much shall be for the child Grace Cradit, and show the same by your verdict.

If under the evidence you find that Plaintiff is not entitled to recover, then you should return a verdict finding for Defendant.

12.

The Jury is instructed that the evidence in this case shows that the deceased, Charles M. Cradit, was guilty of contributory negligence in not guarding the rear end of his train on its arrival at the Station Mile Post 426.

Plaintiff excepts to the giving of Paragraph One, of this Instruction.

DEVOE & SWENSON,
Attorneys for Plaintiff.

In this connection I instruct you that the Act of Congress under which this suit is brought provides that such contributory negligence does not defeat or bar a recovery on the part of the Plaintiff altogether, but the damages shall be diminished by the Jury in proportion to the amount of negligence attributable to the said Charles Mr. Cradit.

So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the said Charles M. Cradit does not defeat a recovery by the Plaintiff herein, but it goes by way of diminution of damages in proportion to his negligence as compared with the combined negligence of himself and the Defendant Company.

13.

The Jury is further instructed that if you find from the evidence that the Defendant was not negligent, or that the said Charles M. Cradit received the injuries which resulted in his death without any negligence on the part of the Defendant, or that the injuries received that resulted in his death were the result of his own negligence; that his own negligence was the proximate cause of his death, then you will return a verdict finding for the Defendant.

27

14.

Testimony has been received in the trial of this action showing that acetylene lights used on engines 501, 504, and 510 went out; that when the acetylene lights went out, lighted white lanterns were placed in the head light of the engine and used in the place of the acetylene light; the difficulty of seeing the block signals and other signals used; the snow in the air and the velocity of the wind.

All this evidence was received, not as evidence of any negligence

on the part of the Defendant Company, but as facts and circumstances to aid the Jury to determine from this evidence, together with all the other evidence shown during the trial, the severity of the storm at the time and place of the accident or wreck.

15.

It is a question of fact for you, Gentlemen of the Jury, to determine from the evidence, whether the injury that caused the death of Charles M. Cradit was because of the negligence of the Defendant Company.

The Defendant Company acts by its agents and employees, and is chargeable with the results of its agents and employees in the management and operation of its trains. The presumption, in the absence of any evidence, is that neither party was negligent or careless; that the Defendant Company and its employees exercised reasonable care, prudence and consideration for the employees engaged in the management and running of its trains; also that the deceased, Charles M. Cradit, used like care, prudence and consideration to protect himself and avoid injury while employed by Defendant in the operation of its trains. This presumption continues as to both the deceased and the Defendant until the contrary is shown by the evidence.

The degree of care required of the Defendant in protecting the deceased from injury was the adoption of all reasonable means and precautions to provide for the safety of the deceased while he
28 was engaged in his employment, and this degree of care is to be measured by the dangers to be apprehended or avoided.

The Defendant was under obligation to not expose the deceased, in conducting its business, to perils or hazards which the Defendant could have guarded against by proper diligence.

The engineer on train 501, the Dispatcher and Assistant Superintendent at Sidney, all represented the Defendant in their respective stations, and failure upon their part, or upon the part of either of them, in the exercise of such reasonable diligence, caution and foresight as an ordinarily prudent man would exercise under similar circumstances to guard the deceased from injury, was negligence of the Defendant.

In determining the question of the Defendant's negligence, if any, it is competent for you to consider the character and severity of the storm at the time and place of the collision; the block signals maintained by Defendant to give warnings of danger; the ability of persons to see signals by lantern, fusees, and torpedoes; the orders, if any, that were given by the Dispatcher and the Assistant Superintendent at Sidney, or by either of them; the knowledge, if any, that either the Dispatcher or the Assistant Superintendent has as to the severity of the storm; of the ability or inability of the train men to see the block signals and other signals at the time they gave any orders as to the running of the three trains in question, if they or either of them gave any orders; the degree of dili-

gence or lack of diligence they are shown to have exercised to avoid injury to the deceased; that care or lack of care on the part of the engineer running train Extra 501 to see train Extra 504 and avoid running into it.

On the part of the deceased, it is competent for you to consider his opportunities to discover and avoid the danger to which he might be exposed; his conduct in the matter of precaution or lack of precaution in flagging the train he was on, to avoid its being run
29 into by train Extra 501, and thereby avoid danger. In short, you will consider all the facts and circumstances shown in the testimony bearing upon the conduct of the Defendant and the deceased.

If, upon consideration of all the testimony, you find that the injury which caused the death of Charles M. Cradit was the proximate result of the negligence of the Defendant or its employees, then you should find for Plaintiff as directed in Instruction No. 10.

16.

As one of its defenses the Defendant pleads what is known and called assumption of risk. You are instructed as a matter of law that a servant or employee assumes the ordinary risks and dangers incident and peculiar to the employment upon which he enters, but he does not assume any risk or dangers due to the master's or employer's negligence, nor does he assume risks or dangers arising from sudden, unfor-seen circumstances, not ordinarily incident to his employment.

The employer relies, as he has the legal right to do, upon the presumption that due care will be exercised by each employee to avoid injury to himself, and by each employee to avoid injury to his co-employees.

In this case, when the deceased accepted his employment as Brakeman for the Defendant Company he assumed all the risks and hazards incident and peculiar to the business of brakeman in the business of operating and running trains and handling cars by the Defendant Company in its business of carrying on interstate commerce by railroad.

It is for you, Gentlemen of the Jury, to determine from all the evidence in this case, from all the facts and circumstances shown on the trial, whether or not the injury and death of the deceased, Charles M. Cradit, was because of the risks and hazards incident and peculiar to the employment in which he was engaged.

30 If, from all the evidence, you find that the injury and death of the said Charles M. Cradit was due to and the result of the risks and hazards incident and peculiar to the business of brakeman in the operation and running of trains, then Plaintiff cannot recover herein; and if you so find, you will return a verdict finding for the Defendant.

17.

In coming to any conclusion in this case the Jury should be governed by the evidence introduced before you, and by that alone. You will disregard entirely any remarks by counsel not warranted by the evidence. The evidence is what the witnesses were permitted to testify while on the witness stand, and not what any counsel or the Court may have stated their recollection of the evidence was. You have no right to indulge in speculations, conjectures or inferences that are supported by the evidence.

Each Juror may apply to the subject before him that general knowledge which any man may be presumed to have; yet, if he be personally acquainted with any material or particular fact or facts, he is not permitted to mention the circumstance to his fellow Jurors. If any Juror knows any particular fact or facts material to the issues in this case, it is his duty, while sitting as a Juror, during the trial and deliberating on this case, to keep and remain silent in relation thereto.

So far as there is a conflict in the evidence, it is your sole duty to reconcile it if you can; or if you cannot, to determine which is true and which is untrue, and you are to give such weight to the testimony of any witness as you deem it entitled to under all the circumstances of the case.

Take this case, and from all the facts and circumstances of the case, shown during the trial, return such a verdict as you believe to be just and right.

31

18.

Upon retiring to your Jury Room, you will first select one of your number as foreman. You will then proceed to your deliberations.

I send out with you two verdicts, one being for the Plaintiff and one for the Defendant. When you arrive at an agreement you will fill the blanks in the verdict in whose favor you find. Your foreman will sign the verdict you agree upon. You will then notify the officer having you in charge that you have agreed upon a verdict, and he will then conduct you into open Court where your verdict will be received.

H. M. GRIMES, *Judge*.

And on the said 4 day of October, 1913, there were filed in the office of the said Clerk, certain Instructions Requested by Defendant, in words and figures, following, to-wit:

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Instructions Requested by Defendant.

Instruction No. 1.

You are instructed to return a verdict for the Defendant.

Refused.

H. M. GRIMES, *Judge.*

Instruction No. 2.

You are instructed that the Plaintiff has failed to sustain by sufficient proof the allegation in the petition that Train Dispatcher, W. A. Borton, was negligent in ordering Extra 501 East to follow Extra 504 East from Dix, Nebraska, to Sidney, Nebraska, and in close proximity to Extra 504 East, and you are, therefore, instructed that you cannot base any verdict in this case against the Defendant upon that allegation of negligence.

Refused.

H. M. GRIMES, *Judge.*

Instruction No. 3.

You are instructed that the action of the Defendant in permitting Extra 501 East to leave Potter on the night of the wreck before Extra 504 East left Mile Post 426 was not the proximate cause of the death of Charles M. Cradit and, you are, therefore, instructed that you must not base any verdict against the Defendant in this case upon that action.

Refused.

H. M. GRIMES, *Judge.*

Instruction No. 4.

You are instructed that the evidence of the Plaintiff is not sufficient to show any negligence on the part of G. D. Sage, Assistant Superintendent at Sidney, Nebraska, in ordering Extra 510 West to proceed West from Sidney, Nebraska, at 1:10 A. M. on March 14, 1913, and you are, therefore, instructed that you must not base any verdict against the Defendant upon that action.

Refused.

H. M. GRIMES, *Judge.*

Instruction No. 5.

You are instructed that the evidence shows that the action of G. D. Sage, Assistant Superintendent at Sidney, Nebraska, in ordering Extra 510 to proceed West from Sidney, Nebraska, at 1:10 A. M. March 14, 1913, was not the proximate cause of the death of Charles M. Cradit, and you are, therefore, instructed that you must not base any verdict that you might return against the Defendant in this case upon that action.

Refused.

H. M. GRIMES, *Judge*.

33

Instruction No. 6.

You are instructed that the Plaintiff failed to show that there was any negligence on the part of the Defendant by reason of the action of W. A. Borton, Train Dispatcher, at Sidney, Nebraska, in ordering Extra 504 East to pick up the engine of 510 West at Mile Post 426, and you are, therefore, instructed that you must not base any verdict against the Defendant in this case upon that action.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 7.

You are instructed, that the act of the Defendant in ordering Extra 504 East to pick up the engine of Extra 510 West at Mile Post 426 was not the proximate cause of the death of Charles M. Cradit, and you are, therefore, instructed that you must not base any verdict in this case against the Defendant upon that action.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 8.

You are instructed that the Plaintiff herein has failed to show any negligence upon the part of the Defendant in failing to take on the Conductor of Extra 501 East at Potter, Nebraska.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 9.

You are instructed that the absence of the Conductor of Extra 501 East from his train after it left Potter, Nebraska, was not the proximate cause of the death of Charles M. Cradit, and you are, therefore, instructed that you must not base any verdict that you might find against the Defendant in this case upon that fact.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 10.

You are instructed that the Plaintiff has failed to sustain by sufficient proof the allegations in the petition that Extra 501 was running by signals on the night of the wreck on account of the failure of Defendant in operating Extra 501 East without a conductor and you are, therefore, instructed that you must not base any verdict that you might return in this case against the Defendant upon that allegation.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 11.

You are instructed that the evidence fails to show that the Defendant herein was guilty of any negligence toward Charles M. Cradit in running by signals with Extra 501 East at the time of the wreck.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 12.

You are instructed that the action of Extra 501 East in running by the block signals at the time of the wreck in question was not the proximate cause of the death of Charles M. Cradit and, you are, therefore, instructed that you must not base any verdict in this case against the Defendant upon that action.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 13.

You are instructed that the Plaintiff herein has failed to show any negligence on the part of the Defendant herein in operating trains 501 East, 504 East and 510 West without head lights.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 14.

You are instructed that the Plaintiff herein has failed to show any negligence on the part of the Defendant herein in operating train 501 East without a head light.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 15.

You are instructed that the Plaintiff herein has failed to show any

negligence on the part of the Defendant herein in operating train 504 East without a head light.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 16.

You are instructed that the Plaintiff herein has failed to show any negligence on the part of the Defendant herein in operating train 510 West without a head light.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 17.

You are instructed that you must not base your verdict in this case upon any acts of negligence that may have been committed by H. W. Cameron, the Engineer on Extra 501 East.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 18.

You are instructed that the evidence in this case shows that the death of Charles M. Cradit resulted from dangers and risks which were assumed by him and that, therefore, the Plaintiff cannot recover in this case.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 19.

You are instructed that the evidence in this case shows that the deceased, Charles M. Cradit, at the time of his death was guilty of negligence *with* contributed to the cause of his death.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 20.

You are instructed that the negligence of Charles M. Cradit, the deceased, at the time of his death was the proximate cause of his death.

Refused.

H. M. GRIMES, *Judge*.

Instruction No. 21.

You are instructed that, under the evidence in this case, the law

presumes that the dangers and risks incident to the operation of Extra 504 East and Extra 501 East were as open, apparent and obvious to the said Charles M. Cradit as they were to the Defendant in this case, and you are further instructed that, when the said Charles M. Cradit continued in the employment of this Defendant with that knowledge, he assumed all of the risks and dangers incident to the operation of said trains at the time of the wreck.

Refused.

H. M. GRIMES, *Judge*.

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Instruction No. 22 Asked by Defendant.

You are instructed that if you find that Engineer, Cameron, had the conversation with Conductor Phillips in the presence of Flagman Cradit on the engine at Dix as testified to by Witnesses Cameron & Long, to-wit:

That,

He, Cameron, was having difficulty in seeing the signals and that he requested Phillips in case his train stopped, to do a good job of flagging and put out plenty of fuseses,

Then you are instructed that Cradit assumed the risk of Cameron proceeding without seeing the signals.

Refused.

H. M. GRIMES, *Judge*.

37 That on the 4 day of October, 1913, that being the sixth day of the September, A. D., 1913 Term of Court, were had and done the following proceedings herein, as appears upon Court Journal 6, at Page 341.

Journal Entry.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Trial Proceeded.

And on the 4 day of October, 1913, Court convened, pursuant to adjournment. Jury called and trial proceeded. And the taking of testimony being concluded, counsel for the respective sides made arguments to the Jury and on the conclusion of said arguments, the

Jury having heard the testimony, the arguments of the Counsel and being duly instructed by the Court, retired, in charge of the Sheriff, for deliberation.

H. M. GRIMES, *Judge.*

And on the said 4 day of October, 1913, there was filed in the office of the said Clerk, certain Defendant's Exceptions to Instructions, in words and figures, following, to-wit:—

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M.
Cradit, Deceased, Plaintiff,

VS.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Defendant's Exceptions to Instructions.

38 The Defendant excepts to Paragraph One, of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Two of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Three of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Four of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Five of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Six of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Seven of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Eight of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Nine of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Ten of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Eleven of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Twelve of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Thirteen of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Fourteen of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Fifteen of the Instructions given by the Court of its own motion.

39 The Defendant excepts to Paragraph Sixteen of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Seventeen of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Seventeen and One-Half of the Instructions given by the Court of its own motion.

The Defendant excepts to Paragraph Eighteen of the Instructions given by the Court of its own motion.

The Defendant excepts to the refusal of the Court to give Paragraph One of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Two of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Three of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Four of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Five of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Six of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Seven of the Instructions tendered by the Defendant.

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The Defendant excepts to the refusal of the Court to give Paragraph Nine of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Ten of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Eleven of the Instructions tendered by the Defendant.

40 The Defendant excepts to the refusal of the Court to give Paragraph Twelve of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Thirteen of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Fourteen of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Fifteen of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Sixteen of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Seventeen of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Eighteen of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Nineteen of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Twenty of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Twenty-One of the Instructions tendered by the Defendant.

The Defendant excepts to the refusal of the Court to give Paragraph Twenty-two of the Instructions tendered by the Defendant.

MILES & McINTOSH,
A. G. ELICK,
EDSON RICH,

Attorneys for Defendant, Union Pacific Railroad Company.

Each, all and every of the above and foregoing Exceptions, allowed, this October 4, 1913.

H. M. GRIMES, *Judge.*

41 That on the 5 day of October, 1913, that being the Seventh day of the September, A. D. 1913, Term of Court, were had and done the following proceedings herein, as appears upon Court Journal 6, at Page 341.

Journal Entry.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Verdict and Special Findings of Jury Returned.

And the Jury, on the 5 day of October, 1913, returned into open Court, the following Verdict:

THE STATE OF NEBRASKA,

Cheyenne County, ss:

September Term, A. D. 1913, to-wit, October 5, 1913.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

We, the Jury in this case, being duly impaneled and sworn, do find and say, that we find for Plaintiff and we fix the amount of his recovery, at \$25,000.00.

We apportion said sum, as follows:

To Edith Cradit, \$15,000.00.

To Violet B. Cradit, \$5,000.00.

To Grace Cradit, \$5,000.00.

W. W. CHOWINS, *Foreman.*

42 Endorsed: Verdict of Jury. Charles M. Hadley, Administrator, vs. Union Pacific Railroad Company. Filed October 5, 1913. H. T. Doran, Clerk District Court.

Also, at the same time, the Jury returned Special Findings, Numbered 1, 2 and 3, whereupon, the Court observed, that Special Finding Numbered 2, had not been answered by the Jury and thereupon, asked the Jurors if the answer had been agreed upon and the Jury answering, that they had so agreed, saying, that answer to first question, answered second. Whereupon, the Court directed the Foreman of said Jury, to write the answer the Jury had agreed upon, to said Special Finding. And thereupon, the Foreman wrote, in answer to said Special Finding, "Nothing."

The Court, thereupon, observed, that Special Finding Numbered 3, had not been signed, by the Foreman of the Jury and the Jurors, in answer to the inquiry of the Court, responded, that they thought one signature was sufficient to all of said Special Findings. The Foreman, by direction of the Court, signed Special Finding Numbered 3. To all of which, Defendant excepted, then and there and at the time and place, to each and every direction of the Court, as to Special Findings.

Whereupon, the Jurors returned into open Court, the Special Findings, as follows:

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Special Findings Requested by Defendant.

If you find a verdict for the Plaintiff, in this cause, then, you will specifically, answer the following questions, inserting the answers in the blanks left, at the end of the questions, for that purpose:

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1.

The total amount of damage, which you find the wife and children of Charles M. Cradit, have suffered, by reason of his death. \$—. Twenty-five Thousand Dollars (\$25,000.00).

2.

The amount you find, should be deducted from the above sum, by reason of the negligence of the said Charles M. Cradit. \$—. Nothing.

W. W. CHOWINS, Foreman.

Plaintiff excepts.

DEVOE & SWENSON,
Plaintiff's Attorneys.

in the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M.
Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Special Finding Requested by Defendant.

3.

Was there a conversation, between Engineer, Cameron and Conductor, Phillips, in the presence of Brakeman Cradit and Fireman Long, on the engine 501, while the same was standing at Dix, to the effect, that it was difficult for Engineer, Cameron, to see the signals, and that in case Conductor Phillips' train was stopped, a good job of flagging, would be done and plenty of fusees thrown out?

Yes.

No conversation. No.

W. W. CHOWINS, *Foreman.*

Thereupon, the Jury was polled by the Court, as to the verdict and the Special Findings, returned by the Jury, and each Juror responded, that the verdict returned, was his verdict and that
44 the Special Findings returned, were his Special Findings.

H. M. GRIMES, *Judge.*

And afterwards, on the 7 day of October, 1913, there was filed in the office of the said Clerk, a certain Motion for New Trial, in words and figures, following, to-wit:

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M.
Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Motion for a New Trial.

Comes now the Defendant and moves the Court to vacate any judgment and the verdict of the Jury herein general and special and for a new trial of the above entitled cause for the following reasons:

1.

Irregularity in the proceedings of the Court by which this Defendant was prevented from having a fair trial.

2.

Irregularity in the proceedings of the Jury by which this Defendant was prevented from having a fair trial.

3.

Irregularity in the proceedings of the prevailing party by which this Defendant was prevented from having a fair trial.

4.

Abuse of discretion by the Court by which this Defendant was prevented from having a fair trial.

45

5.

Misconduct of the Jury.

6.

Misconduct of the Plaintiff herein.

7.

Accident and surprise which ordinary prudence could not have guarded against.

8.

The damages are excessive and appear to have been given under the influence of passion.

9.

The damages are excessive and appear to have been given under the influence of prejudice.

10.

Error in the assessment of the amount of recovery in this, that the verdict of the Jury is too large.

11.

The verdict of the Jury is not sustained by sufficient evidence.

12.

The verdict of the Jury is contrary to law.

13.

Errors of law occurring at the trial and duly excepted to by this Defendant.

14.

The Court erred in over-ruling the objection of this Defendant made in the commencement of the trial to the introduction of any evidence in said cause to which ruling of the Court this Defendant at the time duly excepted.

46

15.

The Court erred in over-ruling the motion of this Defendant made at the close of the Plaintiff's evidence to dismiss said action, to which ruling of the Court this Defendant at the time duly excepted.

16.

The Court erred in over-ruling Defendant's motion made at the close of Plaintiff's evidence, to instruct the Jury to return verdict for the Defendant, to which ruling of the Court this Defendant at the time duly excepted.

17.

The Court erred in over-ruling the motion of this Defendant made at the conclusion of all of the evidence in said case, to instruct the Jury to return a verdict in favor of this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

18.

The Court erred in giving to the Jury Instruction No. 1, given by the Court to the Jury on its own motion to which ruling of the Court this Defendant at the time duly excepted.

19.

The Court erred in giving to the Jury Instruction No. 2, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

19.

The Court erred in giving to the Jury Instruction No. 3, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

20.

The Court erred in giving to the Jury Instruction No. 4, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

21.

47 The Court erred in giving to the Jury Instruction No. 5, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

22.

The Court erred in giving to the Jury Instruction No. 6, given by
3—495

the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

23.

The Court erred in giving to the Jury Instruction No. 7 given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

24.

The Court erred in giving to the Jury Instruction No. 8, given by the Court to the jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

25.

The Court erred in giving to the Jury Instruction No. 9, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

26.

The Court erred in giving to the Jury Instruction No. 10, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

27.

The Court erred in giving to the Jury Instruction No. 11, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

28.

The Court erred in giving to the Jury Instruction No. 12, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

48

29.

The Court erred in giving to the Jury Instruction No. 13, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

30.

The Court erred in giving to the Jury Instruction No. 14, given by the Court on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

31.

The Court erred in giving to the Jury Instruction No. 15, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

32.

The Court erred in giving to the Jury Instruction No. 16, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

33.

The Court erred in giving to the Jury Instruction No. 17, given by the Court to the Jury on its own motion, to which ruling of the Court this Defendant at the time duly excepted.

34.

The Court erred in refusing to give to the Jury Instruction No. 1, requested by this Defendant, to which ruling of the Court, this Defendant at the time duly excepted.

35.

The Court erred in refusing to give to the Jury Instruction No. 2, requested by this Defendant, to which ruling of the Court, this Defendant at the time duly excepted.

36.

The Court erred in refusing to give to the Jury Instruction No. 3, requested by this Defendant, to which ruling of the Court, this Defendant at the time duly excepted.

49

37.

The Court erred in refusing to give to the Jury Instruction No. 4, requested by this Defendant, to which ruling of the Court, this Defendant at the time duly excepted.

38.

The Court erred in refusing to give to the Jury Instruction No. 5, requested by this Defendant, to which ruling of the Court, this Defendant at the time duly excepted.

39.

The Court erred in refusing to give to the Jury Instruction No. 6, requested by this Defendant, to which ruling of the Court, this Defendant at the time duly excepted.

40.

The Court erred in refusing to give to the Jury Instruction No. 7, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

41.

The Court erred in refusing to give to the Jury Instruction No. 8, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

42.

The Court erred in refusing to give to the Jury Instruction No. 9, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

43.

The Court erred in refusing to give to the Jury Instruction No. 10., requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

44.

The Court erred in refusing to give to the Jury Instruction No. 11, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

50

45.

The Court erred in refusing to give to the Jury Instruction No. 12, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

46.

The Court erred in refusing to give to the Jury Instruction No. 13, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

47.

The Court erred in refusing to give to the Jury Instruction No. 14, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

48.

The Court erred in refusing to give to the Jury Instruction No.

15, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

49.

The Court erred in refusing to give to the Jury Instruction No. 16, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

50.

The Court erred in refusing to give to the Jury Instruction No. 17, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

51.

The Court erred in refusing to give to the Jury Instruction No. 18, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

51

52.

The Court erred in refusing to give to the Jury Instruction No. 19, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

53.

The Court erred in refusing to give to the Jury Instruction No. 20, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

54.

The Court erred in refusing to give to the Jury Instruction No. 21, requested by this Defendant, to which ruling of the Court this Defendant at the time duly excepted.

55.

The Court erred in sustaining the motion of the Plaintiff to amend Paragraph 11 of the petition in said cause by adding to the end of said Paragraph the following:—

“All of which said trains, to-wit: Extra 501 East, Extra 504 East and Extra 510 West, were running without head lights, because the severity of the storm was such that the acetylene head lights on said engine- could not be kept lit,”—to which ruling of the Court this Defendant at the time duly excepted.

56.

The Court erred in permitting the Plaintiff to amend Paragraph 11 of the petition in said cause by adding to the end of said Paragraph the following:

"All of which said trains, to-wit: Extra 501 East, Extra 504 East and Extra 510 West, were running without head lights, because the severity of the storm was such that the acetylene head lights on said engine- could not be kept lit,"—to which ruling of the Court this Defendant at the time duly excepted.

52

57.

The Court erred in permitting the Jury to make its finding and in determining its answer to the Second Special Finding submitted to said Jury without retiring to the Jury Room for private deliberation thereon, to which ruling of the Court this Defendant at the time duly excepted.

58.

The Court erred in ordering the Jury to answer and make its finding as to the Second Special Finding submitted to the Jury, without retiring for deliberation thereon to the Jury Room, to which ruling of the Court this Defendant at the time duly excepted.

59.

The Court erred in permitting the Jury to publicly deliberate upon and to publicly make its finding as to the Second Special Finding submitted to the Jury, to which ruling of the Court this Defendant at the time duly excepted.

60.

The Court erred in ordering the Jury to deliberate upon and make its finding as to the Second Special Finding submitted to the Jury in public, to which ruling of the Court this Defendant at the time duly excepted.

61.

The Special Finding of the Jury, that no conversation was had between Engineer Cameron and Conductor Phillips in the presence of Brakeman Cradit and Fireman Long on engine 501 while the same was standing at Dix, to the effect that it was difficult for Engineer Cameron to see the signals and that in case Conductor Phillips' train was stopped, a good job of flagging would be done and plenty of fusees thrown out, is not sustained by sufficient evidence.

53

62.

The Statute upon which the cause of action herein is based, commonly known as the Federal Employers' Liability Act, is unconstitutional and void, for the reason that said Statute violates and is repugnant to and in contravention of that part of Article 5 of the Amendments to the Constitution of the United States, wherein it is provided that no person shall be deprived of life, liberty or property without due process of law.

63.

That the Statute upon which said cause of action is based, commonly known as the Federal Employers' Liability Act, is unconstitutional and void, for the reason that it violates, is repugnant to and in contravention of Section 1 of Article 14 of the Amendments to the Constitution of the United States, wherein it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

64.

The Statute upon which said cause of action is based, commonly known as the Federal Employers' Liability Act, is unconstitutional and void in this, that it violates, is repugnant to and in contravention of Article 7 of the Amendments to the Constitution of the United States, wherein it is provided that in suits at common law where the value in controversy shall exceed Twenty Dollars (\$20.00), the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.

54

65.

The Statute upon which this cause of action is based, commonly known as the Federal Employers' Liability Act, is unconstitutional and void, for the reason that the same violates, is repugnant to and in contravention of Section 2 of Article 3 of the Constitution of the United States, wherein it is provided, that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution of the United States, the laws of the United States or which shall be made under their authority and to controversies between citizens of different states.

66.

The second Special Finding of the Jury is contrary to the evidence.

67.

The second Special Finding of the Jury is contrary to law.

68.

The Court erred in giving to the Jury Instruction No. 18, given to the Jury by the Court on its own motion to which ruling of the Court this Defendant at the time duly excepted.

69.

The Court erred in refusing to give to the Jury Instruction No. 22, requested by this Defendant to which ruling of the Court this Defendant at the time duly excepted.

UNION PACIFIC RAILROAD COMPANY,

By MILES AND McINTOSH,
EDSON RICH,
A. G. ELLICK

Its Attorneys.

55 And afterwards, on the 8 day of October, 1913, there was filed in the office of the said Clerk, a certain Motion to specify apportionment of remittitur, Remittitur of Charles M. Hadley, Administrator, Plaintiff and Remittitur of Edith M. Cradit, in the words and figures, following, to-wit:

Motion.

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Motion.

Comes now the Defendant and moves the Court, after the announcement by the Court, that he would order a remittitur on the part of Plaintiff of \$10,000.00, partly because the verdict is excessive and partly because no allowance was made on account of the contributory negligence of Charles M. Cradit, deceased, that the Court specify what part of said \$10,000.00 is deducted by the Court on account of the contributory negligence of said deceased.

UNION PACIFIC RAILROAD COMPANY,

By MILES & McINTOSH,
EDSON RICH,
A. G. ELLICK,

Its Attorneys.

56

Remittitur.

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M.
Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Remittitur.

Comes now the Plaintiff, Charles M. Hadley, Administrator of the estate of Charles M. Cradit, deceased and hereby remits from the verdict, heretofore rendered by the Jury in this case, the sum of \$10,000.00, as provided for in the order of said Court.

CHARLES M. HADLEY,
Administrator.

Remittitur.

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M.
Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Remittitur.

Comes now Edith M. Cradit and hereby remits from the portion of the verdict, awarded to her, by the Jury in the above entitled action, the sum of \$10,000.00, as provided by the Order of the Court.

EDITH M. CRADIT.

57 That on the 8 day of October, 1913, that being the ninth day of the September, A. D. 1913, Term of Court, were had and done the following proceedings herein, as appears upon Court Journal 6, at Page 343.

Journal Entry.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M.
Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Judgment.

And now, on this 8 day of October, the same being one of the days of the Regular September, 1913, Term of this Court, this cause came on to be heard, upon the Defendant's Motion for a continuance, for

ten days, to prepare for argument of Motion for New Trial and the Court being fully advised in the premises, finds, that this is the last day of this Term of Court, and the Court having terms of Court, set in other counties, that will take all of his time, until about the end of the year, said motion was overruled.

To all of which, Defendant excepts.

Whereupon, this cause came on, further, to be heard, upon the motion of the Defendant, to grant a new trial and the Court being fully advised in the premises, finds:

That the verdict is excessive, in amount; that the Jury disregarded the Instructions of the Court, in failing to deduct, from the damages sustained by the Plaintiff, any amount attributable to contributory negligence of the deceased, Charles M. Cradit.

It is therefore ordered and the Plaintiff is hereby required to remit, from said verdict, the sum of \$10,000.00, from the amount of said verdict, for the amount to be deducted because of the contributory negligence of the deceased, Cradit and because said verdict was in excess of the amount Plaintiff should recover or new trial be granted.

58 Whereupon, said cause came on, further, to be heard, upon the motion of the Defendant, requiring Court to state how much of said verdict was in excess of the amount Plaintiff should recover, and how much should be credited or how much the verdict should be diminished, because of the contributory negligence of the deceased.

And on consideration, thereof, the Court requires a remittitur of \$10,000.00, in full, of both and refuses to fix an exact amount of either; the amount of such, being a question for the Jury.

To which ruling of the Court, Defendant excepts.

The Defendant's motion to find said amounts, separately, is overruled. To which ruling of the Court, Defendant excepts.

Whereupon, the Plaintiff filed a remittitur, in the sum of \$10,000.00, from the verdict heretofore rendered by the Jury and Edith M. Cradit, widow of the deceased, for herself, filed a remittitur, for \$10,000.00, from the \$15,000.00, awarded to her, by the said Jury, leaving the amount of said verdict coming to her, \$5,000.00; Violet B. Cradit, \$5,000.00; and to Grace Cradit, \$5,000.00.

Whereupon, the motion of Defendant, for a new trial, was, by the Court, overruled. To all of which, Defendant excepts.

Whereupon, said cause coming on for judgment, by the Court and it was considered by the Court, that the Plaintiff have and recover, from the Defendant, the sum of \$15,000.00, to be apportioned, as follows:

To Edith Cradit, widow, \$5,000.00; Violet B. Cradit, \$5,000.00; Grace Cradit, \$5,000.00.

To all of which, Defendant excepts.

It is further ordered, that forty days, from the rising of Court, be allowed, to prepare and serve Bill of Exceptions and that Supersedeas Bond be fixed, double the amount of judgment, as by law required.

H. M. GRIMES, Judge.

59 And afterwards, on the 17 day of October, 1913, there was filed in the office of the said Clerk, a certain Undertaking on Appeal, in words and figures, following, to-wit:

In the District Court of Cheyenne County, Nebraska.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Undertaking on Appeal.

Know all Men by these Presents: That we, Union Pacific Railroad Company, as Principal, and National Surety Company, as Surety, are held and firmly bound unto Charles M. Hadley, Administrator of the estate of Charles M. Cradit, deceased, in the penal sum of Thirty-One Thousand Dollars (\$31,000.00) for the payment of which well and truly to be made, we hereby bind ourselves.

Dated this 15th day of October, 1913.

Whereas, on the 8th day of October, 1913, a judgment was rendered in the District Court of Cheyenne County, Nebraska, in favor of Charles M. Hadley, Administrator of the estate of Charles M. Cradit, deceased, and against Union Pacific Railroad Company for the sum of Fifteen Thousand Dollars (\$15,000.00) in an action pending therein wherein Charles M. Hadley, Administrator of the estate of Charles M. Cradit, deceased, was Plaintiff and Union Pacific Railroad Company was Defendant, and said Union Pacific Railroad Company intends to appeal said cause to the Supreme Court of the State of Nebraska;

Now Therefore, The Condition of this obligation is such that if said Union Pacific Railroad Company shall prosecute such appeal without delay and pay all condemnation money and costs which may be found against it on the final determination of said cause in the Supreme Court, then this obligation shall be null and void, otherwise to remain in full force and effect.

UNION PACIFIC RAILROAD COMPANY,

By A. G. ELLICK, *Its Attorney.*

[SEAL.]

NATIONAL SURETY COMPANY,

By GEO. C. COOPER, *Its Attorney in Fact.*

The execution of the foregoing bond and the sufficiency of the surety therein are hereby approved this 17th day of October, 1913.

[SEAL.]

H. T. DORAN,

Clerk of the District Court.

The September, A. D. 1913, Term of the District Court of Cheyenne County, Nebraska, adjourned sine die, October 8, 1913.

THE STATE OF NEBRASKA,
Cheyenne County, ss:

I, H. T. Doran, Clerk of the District Court, in and for Cheyenne County, Nebraska, do hereby certify, that the foregoing is a full, true and complete Transcript of the record and proceedings, in the case of Charles M. Hadley, as Administrator of the estate of Charles M. Cradit, deceased, against Union Pacific Railroad Company, as fully as the same remains on file and of record in my office.

I further certify, that the Bill of Exceptions, hereto attached, is the original Bill of Exceptions filed in my office, in the above entitled action.

In Testimony Whereof, I have hereunto set my hand and caused to be affixed the Seal of said District Court, this 22 day of December, A. D. 1913.

[SEAL.]

H. T. DORAN,
*Clerk of the District Court of
Cheyenne County, Nebraska.*

Fees of this Transcript, \$23.50.

61 And on the 29th day of December, 1913, there was filed in the office of the clerk of the Supreme Court of the State of Nebraska a certain bill of exceptions in words and figures following, to-wit:

62 In the District Court of the Thirteenth Judicial District of the State of Nebraska within and for the County of Cheyenne, in said Judicial District and State.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Appearances:

For Plaintiff: Devoe & Swenson, Wilcox & Halligan.

For Defendant: Miles & McIntosh, Edson Rich, A. G. Ellick.

Tried Before the Hon. H. M. Grimes and a Jury.

Be it remembered that on the 30th day of September, 1913, that being one of the days of the regular September, 1913, term of the District Court in and for Cheyenne County, Nebraska, the above entitled cause was tried before the Hon. H. M. Grimes and a jury; that on the trial of said cause on said day the plaintiff and defendant, to maintain the issues joined on their respective parts, introduced and offered before the said Court and jury the following oral and documentary evidence, and interposed the objections and took the exceptions herewith noted.

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Plaintiff's Witnesses:

	Direct.	Cross.	Redirect.
F. G. McManus	113	146	157
Jas. Cunningham	163	194	198
U. A. Buckingham	199		
L. E. McGinnis	201	220	230
J. J. McConaughy	233	262	302
Mrs. Edith Cradit	310	312	315
Swan Dedrick	317	323	
Chas. M. Hadley	324		
J. J. McConaughy, Recalled	325	326	

Defendant's Witnesses:

James Zalesky	330	335	340
C. P. Richardson	344	351	353
H. W. Cameron	353	360	376
Chas. W. Long	383	385	
Fred Brendel	386	391	
Wallace Lynch	394	400	405
James Farrell	407	412	416
V. A. Wirt	417	424	435
W. A. Borton	437	441	448
V. A. Wire, Recalled	449	449	450
Harry Gilfoyle	451	454	
W. A. Hopkins	457	462	465
J. C. Williams	471	475	476
Glenn E. Mann	477	480	486
F. H. Douglas	486	488	489
Marion Roseboom	491		
F. H. Douglas, Recalled		493	494
Jno. McClaneghan	495	497	497
Jno. McClaneghan, Recalled	498	498	
Exhibits	502	sqq.	

Plaintiff's Evidence.

(Plaintiff offers in evidence Exhibit A, being letters of administration issued to the plaintiff in the Estate of Charles M. Cradit, Deceased. At this time the defendant objects to any testimony in this action for the reason that the petition does not state facts sufficient to constitute a cause of action. Overruled. Defendant excepts. Defendant objects to the offer of Exhibit A as incompetent, irrelevant, and immaterial, but defendant admits that the paper is executed by the county judge and under the seal of his office. Objection overruled. Defendant excepts.)

(Plaintiff's Exhibit A is read to the jury by Mr. Halligan.)

(Plaintiff is given permission to withdraw Exhibit A and substitute a copy thereof.)

65 FRED G. McMANUS, called as a witness on behalf of the plaintiff, and duly sworn, testified as follows:

Direct examination by Mr. Halligan:

Q. What is your name?

A. Fred G. McManus.

Q. Where do you reside?

A. Cheyenne, Wyoming.

Q. How long have you resided there?

A. Since a year ago last April.

Q. What is your business?

A. Brakeman on the Union Pacific railroad.

Q. How long have you been employed by the Union Pacific?

A. Since a year ago last April.

Q. And in the capacity of brakeman all the time?

A. Yes, sir.

Q. Were you so employed on March 13, 1913?

A. Yes, sir.

Q. Do you remember when you were called upon that day to leave Cheyenne?

A. Yes, sir.

Q. And did you leave Cheyenne that day?

A. Yes, sir.

Q. For what point?

A. Sidney.

Q. And on what kind of a train?

A. Stock train.

Q. How many cars did you have?

A. I understand there were forty.

66 Q. And what were they loaded with?

A. Stock.

Q. Where did you get those cars?

A. At Cheyenne.

Q. And where were you taking them?

A. To Sidney.

Q. Sidney, Nebraska?

A. Yes, sir.

Q. From Cheyenne, Wyoming?

A. Yes, sir.

Q. What kind of stock were they?

A. There were some sheep. I don't know just how many. I believe that is what they were.

Q. Was the entire train composed of stock?

A. I don't know.

Q. About how many cars of sheep were there?

A. I don't know that.

Q. About how many?

A. Well, from what I understand, there were about forty.

Q. About forty cars of sheep?

A. Yes, sir.

Q. And how many cars were in the train?

A. About forty, from what I heard.

Q. Were there any other cars in the train except stock cars?

A. I don't know.

Q. About what time did you leave Cheyenne?

A. Some time between six and seven o'clock in the evening.

Q. What was the number of your train?

A. Extra 504.

Q. Was that known as Extra 504 East?

A. Yes, sir.

67 Q. On what part of the train were you?

A. On the head end.

Q. Who was the engineer and fireman on that train?

A. The engineer was Zalesky and the fireman Cunningham.

Q. And who was brakeman and rear conductor?

A. Charles Cradit brakeman and Ray Phillips conductor.

Q. Where was Mr. Cradit braking?

A. On the rear end.

Q. And where were you braking?

A. On the head end.

Q. You were braking on the head end and Cradit on the rear end?

A. Yes.

Q. Under whose directions were you working there on the train?

A. The engineer's and conductor's.

Q. You were under the engineer's direction?

A. The engineer and conductor.

Q. In whose charge was that train when it left Cheyenne? Who had charge of it?

A. Conductor Phillips.

Q. What are the engineer's duties with reference to having charge of the train?

A. Equally with the conductor.

Q. The engineer and conductor have equal charge of the train, have they?

A. Yes, sir.

Q. What was the condition of the weather when you left Cheyenne?

A. The wind was blowing, and a little snow.

Q. How did the weather continue as you progressed east?

A. It grew worse.

Q. Where did you make your first stop, if you know?

68 A. Burns is the first one I remember of.

Q. Did you stop at Pine Bluffs?

A. Not that I remember of.

Q. Did you stop at Kimball?

A. Now, sir.

Q. Where did you stop east of Pine Bluffs?

A. Bushnell.

Q. How long did you stop at Bushnell?

A. I don't remember how long we were there.

Q. Well, about how long in your best judgment?

A. Well, we might have been there an hour and might have been there longer.

Q. Did you meet any trains there?

A. Yes, sir.

Q. How many?

A. I don't remember that. I remember about meeting a passenger.

Q. How many passengers?

A. One, I believe.

Q. Do you remember what passenger that was?

A. No, sir.

Q. What was the condition of the weather when you were at Bushnell?

A. Snowing hard and the wind blowing hard.

Q. Where did you make the next stop?

A. Dix.

Q. Where did you ride from Bushnell to Dix?

A. In the engine.

Q. On what track was the train placed when you got to Dix?

A. We had it on the siding at Dix.

Q. Who threw the switch to put it in on the siding at Dix?

A. I did.

69 Q. Who closed the switch after your train was on the siding?

A. I don't know.

Q. What is the track at Dix, a double or a single track? Or, I mean, what was it at that time?

A. Well, that is where the double track started in.

Q. There was a double track for a distance west of Dix?

A. Yes, sir.

Q. And a single track from Dix east?

A. Yes, sir.

Q. How far east of Dix did the single track extend?

A. From Dix to Mile Post 426.

Q. About what distance is that?

A. About fifteen miles, I should judge.

Q. About fifteen miles of single track there. Now, what was the track east of Mile Post 426, single or double?

A. Double.

Q. And how far did the double track extend west of Dix?

A. To Kimball.

Q. Did you see any trains at Dix?

A. Yes, sir.

Q. What train did you see at Dix?

A. Extra 501 East.

Q. Where did you see Extra 501?

A. At Dix.

Q. But where with reference to when you stopped? Where was it with reference to your train?

A. We were on the siding and they were on the main line, side by side.

Q. They were on the main line on which track? Were they on the north track or the south track of the double track?

A. They were on the south; the eastbound main.

70 Q. Now, on this road what is the south track known as? What do you railroad men call it?

A. Number Two track.

Q. Well, do you sometimes call it eastbound main?

A. Yes, sir.

Q. On what track do the trains eastbound run, the north or the south track?

A. The south track.

Q. And on what track do the westbound trains run, the north or the south track?

A. The north track.

Q. What do you railroad men call the north track?

A. Number One track.

Q. You call the north track Number One and the south track Number Two; is that right?

A. Yes, sir.

Q. And do you also call the north track the westbound main sometimes?

A. Yes, sir.

Q. Now, then, where with reference to the main tracks, that is, track Number One and track Number Two, at Dix, is the sidetrack that your train was on?

A. Why, the siding is between the two main lines.

Q. Now, the sidetrack was between the two main tracks?

A. Yes, sir.

Q. And that was where you- train 504 was?

A. Yes, sir.

Q. What train was this that came on the main-line track south of you?

A. 501 East.

71 Q. And where was that train at Dix when you first saw it?

That is, with reference to your train, how close were they when you saw it?

A. I don't know.

Q. Now, then, did you see the engine on Extra 501 East there at that time?

A. Yes, sir.

Q. Where was the engine of Extra 501 from your engine, the one on 504?

A. Standing right alongside.

Q. About how many feet would you say one engine was from the other?

A. Well, I should judge their engine was about sixty feet farther east than ours.

Q. A little farther east?

A. Yes, sir.

Q. And about how far was your engine standing from the station at Dix?

A. I don't know.

Q. About how far?

A. Well, I should judge about three telegraph poles.

Q. About how far was your engine standing from the switch from your sidetrack out on to the main line?

A. About 130 or 140 feet.

Q. And how long did you stay at Dix?

A. I don't know.

Q. About how long?

A. It might have been an hour, and it might have been longer.

Q. What were you waiting for?

A. Passenger trains.

72 Q. Did you meet any passenger trains at Dix?

A. Yes, sir.

Q. What passenger train did you meet at Dix?

A. Second Nine, I believe it was.

Q. And how long were you standing at Dix when 501 came up?

A. I don't know.

Q. About how long? We don't expect you to be absolutely accurate, but you can approximate it.

A. Well, probably thirty minutes or a little better.

Q. You were there about thirty minutes when 501 came up?

A. Yes, sir.

Q. Did you see Conductor Phillips at Dix?

A. Yes, sir.

Q. How long were you standing there when he came up?

A. I walked up from the rear end with him.

Q. Did you stop at the rear end and close the switch?

A. I don't remember whether I did or not.

Q. How did you come to be down at the rear end?

A. I dropped back and inspected the train.

Q. Did you go clear to the caboose?

A. Yes, sir.

Q. And was Phillips there when you got there?

A. Yes, sir.

Q. Where was Cradit?

A. He was in the caboose.

Q. And who came with you then from the rear end to the front end of the train?

A. Conductor Phillips.

Q. Did Cradit go up with you?

A. No, sir.

73 Q. Did you see him at the front end of the train that night?

A. Yes, sir.

Q. When?

A. At Bushnell.

Q. I mean at Dix?

A. No, sir.

Q. You didn't see him at Dix?

A. No, sir.

Q. Was he up at the front end of the train there at Dix?

A. I don't know.

Q. But you didn't see him?

A. No, sir.

Q. And he didn't come up with you?

A. No, sir.

Q. Now, what was the condition of the weather at Dix?

A. A big snow storm and wind blowing hard.

Q. About how far could you see a lantern that night when you were at Dix in the storm?

A. A very short distance.

Q. About how many feet or car-lengths? About a car-length?

(Objected to as leading and suggestive. Sustained. Exception.)

Q. Well, about what distance in car-lengths?

A. Well, I don't know.

Q. Well, what is your judgment about it?

(Objected to because the witness has already stated that he is not qualified to answer. Overruled. Exception.)

A. Why, it might have been two or three car-lengths.

Q. What is the custom of the Union Pacific Railroad Company with reference to who gets the orders for the engineer from the station?

74 A. The conductor.

Q. Does the head brakeman ever get orders?

A. Yes, sir.

Q. Did you get any orders that night for your engineer?

A. Yes, sir.

Q. Where did you get orders?

A. At Potter.

Q. Did you get any at Dix?

A. No, sir.

Q. How long after the passenger train went by Dix was it before you pulled out?

A. I don't know.

Q. About how long?

A. Probably thirty minutes.

Q. What were you waiting there for after the passenger train went through?

A. Cleaning out the switches.

Q. How soon after the passenger train went through was it before you commenced to clean out the switch?

A. I don't remember.

Q. Well, about how long? I know you don't remember to the minute. You have some idea, haven't you?

A. Well, we probably started right at it.

Q. Well, don't you know whether you did or not?

A. No, sir.

Q. You don't know what you did after that?

A. I don't know whether we started right at it right then or a little while after.

Q. Well, did you start to clean out the switch as soon as convenient after the passenger had gone through?

A. Yes, sir.

75 Q. How long did it take you to clean out the switch?

A. I should judge about fifteen or twenty minutes.

Q. What was the matter with the switch that it took you fifteen or twenty minutes to clean it out?

A. It was covered over with snow.

Q. And how did the snow interfere with the operation of the switch?

A. Why, it packed between the rails and we couldn't throw the switch.

Q. It was packed between the rails and prevented the switch being thrown over against the other rail, was it?

A. Yes, sir.

Q. How many times did you clean out that switch that night?

A. Once is all I remember of.

Q. And who threw the switch after it was cleaned out?

A. I remember about throwing one.

Q. Well, that one there at Dix?

A. Well, there were two switches to be thrown.

Q. Were there two switches to be thrown in order to get out on to the main line?

A. Yes, sir.

Q. And you remember that you threw one?

A. Yes, sir.

Q. You were standing on the sidetrack, and when you threw the first switch what track did that place you on?

A. Well, it heads you out towards the main line.

Q. And then there was another switch before you got on to the main line?

A. Yes, sir.

Q. And you had to clean out both of them?

A. Yes, sir.

76 Q. Who gave the conductor the order to start?

A. At Dix?

Q. Yes, at Dix?

A. The operator.

Q. Well, after the switch was cleaned out, who told him that the switch was clear and for him to start his train?

A. Why, Conductor Phillips was right there.

Q. Well, who told him? Was it you or Conductor Phillips?

A. Conductor Phillips was helping clean out the switch.

Q. Who told the engineer that the switch was clear and properly thrown?

A. I don't know.

Q. Was there an operator at Dix?

A. Yes, sir.

Q. Where was train 501 when you pulled out with 504?

A. Standing on the main line.

Q. And you pulled out ahead?

A. Yes, sir.

Q. What did you do after you left Dix?

A. Went to Potter.

Q. But what did you do on the engine? What work did you do?

A. I don't remember of doing anything.

Q. What are your duties as head brakeman when the train is in motion?

(Objected to as immaterial. Overruled. Exception.)

A. Well, to look after the train.

Q. What are your duties with reference to signals?

A. To repeat all signals from the rear end to the head end.

Q. What are your duties with reference to block signals along the track?

A. I am supposed to watch them.

77 Q. Well, you are supposed to. Is that your duty to watch the block signals as you go along?

A. Why, I think it is.

Q. Did you do it that night?

A. No, sir.

Q. Why didn't you?

A. Because I couldn't see them.

Q. Why couldn't you see them?

A. Because the storm was too bad.

Q. What was there about the storm that prevented you from seeing the block signals?

A. The snow was blowing so that you couldn't see.

Q. How was the wind after you left Dix and proceeded east?

A. Blowing hard.

Q. State what was the condition of the snow there. The wind alone would not have prevented you from seeing the signals, would it?

A. No, sir.

Q. What was it then with the wind that prevented you from seeing the signals?

A. Snow.

Q. To what extent was the snow falling there that night?

A. It was an awful heavy snow storm.

Q. Had you been out in it considerable?

A. Yes, sir.

Q. Where did you make your next stop after leaving Dix?

A. Potter.

Q. What did you do at Potter?

A. I went to the office.

Q. What did you do in the office?

A. Copied some orders.

78 Q. Who gave you the orders at Potter?

A. The dispatcher.

Q. Did you talk with the dispatcher?

A. Yes, sir.

Q. How did you talk with him?

A. Over the telephone.

Q. And who was the dispatcher?

A. Mr. Borton.

Q. You talked with him over the telephone?

A. Yes, sir.

Q. And what did you talk to him about with reference to this train?

(Objected to as too general. Overruled. Exception.)

A. Towards the movement of our own train.

Q. What was it you told him?

A. I asked him about the meet that we had at Potter with Extra 510 West.

Q. Did you get any orders there?

A. Yes, sir.

Q. What did he tell you to do?

A. I just forget now how the orders did read. I remember about changing the meet with this Extra 510 West.

Q. You remember that he changed that?

A. Yes.

Q. What orders did you get from him with reference to proceeding?

A. Well, we got the change of the meet, and some time on a passenger train. That is all that I remember of.

Q. What did he tell you to do with reference to stopping at Potter or going on down to Mile Post 426?

A. Why, none that I remember of.

79 Q. What did you do with your orders?

A. Gave them to the engineer.

Q. And what did the engineer do after he got the orders?

A. Started for Sidney.

Q. Started his train east?

A. Yes, sir.

Q. What did you tell the dispatcher there about the storm?

(Objected to because sufficient foundation is not laid. Overruled. Exception.)

A. Nothing that I remember of.

Q. Didn't you tell him anything?

(Objected to as leading, suggestive, and cross-examination of his own witness. Overruled. Exception.)

A. Nothing that I remember of telling him.

Q. Nothing that you remember of?

A. No, sir.

Q. Now, let me refresh your memory. Didn't you tell him about the storm?

(Objected to as leading, suggestive, and repetition. Overruled. Exception.)

A. I don't remember of telling him a thing about it.

Q. Do you want the jury to understand that you did not tell him?

(Objected to as leading, suggestive, and repetition. Sustained. Exception.)

Q. What did you tell him about running that train from Dix to Potter and not being able to see the signals?

(Objected to as leading and suggestive, and no sufficient foundation laid. Overruled. Exception.)

A. Nothing.

80 Q. What was your duty to tell the dispatcher about running that train when you couldn't see the signals?

A. My duty probably was to tell him.

Q. You say that you don't remember whether you told him or not?

A. Yes, sir.

Q. Now, I will ask you if it is not a fact that you did tell him about the storm.

(Objected to as repetition. Sustained. Exception.)

Q. What other duty did you neglect that night as head brakeman in addition to neglecting to inform the dispatcher about the storm?

(Objected to as incompetent, irrelevant, immaterial, too general, and not tending to prove any of the acts of negligence charged in the petition. Sustained. Exception.)

Q. Who did you give the orders to?

A. At Potter?

Q. Yes, we are talking about Potter now.

A. The engineer.

Q. What is his name?

A. Zalesky.

Q. And when you gave those you started on?

A. Yes, sir.

Q. Where did you ride, on what part of the train did you ride, after you left Potter?

A. In the engine.

Q. And where was your next stop?

A. Mile Post 426.

Q. What did you do while you were on the engine after you left Potter?

A. I was back and forth from one side to the other.

81 Q. Trying to see the signals?

A. I don't remember about looking for any.

Q. Why didn't you look for them?

A. Because I knew it was no use.

Q. You knew that the signals couldn't be seen in the storm, didn't you?

A. Yes, sir.

Q. And what are these signals that you speak of, that you looked for while you were on the engine there between Dix and Potter? What you call the block signals, are they?

A. (No answer.)

Q. You understand the question, don't you?

A. No, sir.

Q. Are there any signals along the Union Pacific railroad for the guidance of the railroad men going over the road with trains? Now answer that question.

A. Yes.

Q. Well, what are they? What do you call them?

A. Automatic block signals.

Q. And how do they work as you go along? What do you look for them for?

A. To see if the road is clear.

Q. How would they show that night, if you could have seen them, if the road was clear?

A. Green.

Q. How would they have shown if the road was not clear?

A. Red.

Q. And that is what you were looking for, was it, either a red or a green light?

A. Yes, sir.

82 Q. Now, you had been over the road quite a number of times, had you?

A. Yes, sir.

Q. And you knew about where the block signals were located along the road? You knew about where to look for them?

A. Well, about.

Q. Now, after you left Potter, in going to Mile Post 426, how did you locate yourself, that is, on the road? Where could you tell about what part of the road you were on?

A. I didn't try very hard to locate myself.

Q. You just let her go, did you?

A. Yes, sir.

Q. It was your duty to keep watch, wasn't it?

A. It might have been.

Q. Well, do you know whether it was or not? Answer the question.

A. Yes.

Q. Well, now, then, was it or wasn't it?

A. Yes, sir.

Q. But you didn't try to do it?

A. No, sir.

Q. Now, then, why didn't you?

(Objected to as repetition. Question withdrawn.)

Q. Had you been out in the storm much that night?

A. Yes, sir.

Q. And what was your physical condition at that time?

A. I was soaking wet.

Q. What had made you wet?

A. Snow.

Q. What was your condition with reference to exhaustion?

(Objected to as incompetent, irrelevant, and immaterial under the issues. Overruled. Exception.)

83 A. (No answer.)

Q. You know what that means, don't you?

A. Not exactly, no.

Q. You don't know what exhaustion means?

A. (No answer.)

Q. And you can't answer that question for that reason; is that right?

A. (No answer.)

Q. Did you answer that question?

A. No, sir, I didn't.

Q. After you left Potter, at what point on the road did you first locate yourself so as to know where you were?

A. At Mile Post 426.

Q. Didn't you locate yourself before that time?

A. No, sir.

Q. Isn't there a bridge west of Mile Post 426?

A. Yes, sir.

Q. Now, as a matter of fact, couldn't you tell when the engine went over that bridge?

A. I didn't know when it went over, no, sir.

Q. You didn't notice it that night?

A. No, sir.

Q. Did you know when you went by Herdon?

A. No, sir.

Q. Was there any way you could tell except by the signal lights?

A. I might have heard the train go by at the depot at Herdon if I had been paying attention.

Q. Now, as a matter of fact, didn't you hear the train?

A. No, sir.

Q. Was there a signal light at Herdon?

A. Block signal, do you mean?

84 Q. Yes, a block signal.

A. Yes, sir.

Q. Was there one right at the depot?

A. No, sir.

Q. How far from the depot?

A. I should judge about fifteen car-lengths, west.

Q. Was that operated from the depot, or was it a part of the automatic system?

A. Part of the automatic.

Q. Was there a semaphore at the depot at Herdon, operated by the agent in the depot?

A. No, sir.

Q. Now, this station of Herdon, how far was it from Mile Post 426?

A. About a mile and a quarter.

Q. That is, a mile and a quarter to the depot, or to the sidetrack?

A. To the sidetrack.

Q. A mile and a quarter from the depot at 426 to the sidetrack at Herdon?

A. Yes, sir.

Q. Where was the depot at Herdon with reference to the end of the sidetrack at Herdon?

A. About 60 or 65 cars west of the east switch.

Q. And how far was it from the west switch?

A. About fifteen.

Q. The depot at Herdon is near the west sidetrack switch, is it?

A. Yes, sir.

Q. Nearer that than the east?

A. Yes, sir.

Q. And about how far was the depot at Herdon from the depot at Mile Post 426?

A. About a mile and three-quarters, I should judge.

85 Q. How long were you running from Potter to Mile Post 426?

A. I don't know.

Q. Can you give us an estimate?

A. Probably twenty or twenty-five minutes.

Q. How many miles is it from Potter to Mile Post 426?

A. I don't know.

Q. About how many?

A. About six.

Q. How many block signals are there between Potter and Mile Post 426, automatic block signals?

A. I don't know.

Q. Well, can you count and tell us by thinking a little about where they were located, and tell us how many there were in there?

A. The block signals have been changed, the old ones taken out and new ones replaced, and I forget how they were located.

Q. You don't remember how they were located, or you don't remember how many there were?

A. No, sir.

Q. When you stopped at Mile Post 426 how far was the engine from the depot?

A. I couldn't say.

Q. Well, about how far?

A. Probably six or seven cars, more or less.

Q. And which way?

A. East of the depot.

Q. Did you see the light, that is, the signal at Mile Post 426?

A. Not until after we had stopped.

Q. When you stopped what did you do?

A. I went back to the office at Mile Post 426.

Q. What was the condition of the signal at 426?

- 86 A. It was red.
 Q. And what did that signify?
 A. That he had orders for our train.
 Q. And what did you do?
 A. Asked him for the orders.
 Q. Did you see anyone else there that night, that is, any other trains?
 A. Yes, sir.
 Q. What train was there?
 A. Extra 510 West.
 Q. Who was the conductor and head brakeman on that train, Extra 510 West?
 A. Conductor McConaghy and Brakeman Palen.
 Q. Where were they when you first saw them that night?
 A. I don't know whether they were outside or in the office.
 Q. What orders were given to you there that night?
 A. To pick up Extra 510 West's engine and take it back to Sidney.
 Q. What did you do with the order?
 A. Gave it to the engineer.
 Q. Who was the engineer?
 A. Zalesky.
 Q. What orders did he give you then, after you had given him the order to pick up engine 510 and take it back?
 A. He sent word back to the dispatcher that he couldn't pick the engine up.
 Q. Why couldn't he?

(Objected to *an* incompetent. Question withdrawn.)

Q. What did the engineer tell you to tell the dispatcher was the reason that he couldn't pick up the engine from 510?

(Objected to as incompetent unless it is shown that the witness afterwards told the dispatcher. Overruled. Exception.)

- 87 A. I don't remember.
 Q. How is your memory?

A. It may not be very good.

Q. Have you been talking to Mr. Miles about this case?

(Mr. Ellick: We protest against the insulting way that counsel is treating the witness. Overruled. Defendant excepts.)

A. Yes, sir.

Q. Was your memory any worse after you talked with him?

A. Not a bit.

Q. Give the language as near as you can, what Mr. Zalesky told you to tell the dispatcher was the reason that he couldn't pick up the engine from 510.

(Objected to as incompetent, irrelevant, and immaterial unless it is further shown that this witness communicated that to the dispatcher. Overruled. Exception.)

A. All I remember is, he says, "Go back and tell the dispatcher I can't pick up this engine."

Q. And what did you do when you got those instructions?

A. I delivered them to the operator.

Q. And what did the operator do? Did you see what the operator did?

A. He told the dispatcher over the telephone.

Q. What did he tell the dispatcher over the telephone?

A. I don't remember just what all he did say.

Q. Well, do you remember anything he told the dispatcher over the phone?

A. No, sir.

Q. You don't remember a thing?

A. No, sir.

88 Q. Well, after you told the operator what Engineer Zalesky told you, and the operator had talked to the dispatcher, did the operator give you any instructions?

A. He did.

Q. What were they? Do you remember those?

A. He said he had to pick up this engine.

Q. And what did you do then?

A. I went back and told the engineer.

Q. And what did the engineer do?

A. Went back to the office.

Q. Who went with the engineer back to the office?

A. I did.

Q. What was done by you or the engineer after you got back to the office?

A. I don't remember just what we did do.

Q. Did the engineer tell the operator there that he couldn't pick up that engine on 510?

A. I don't know.

Q. You were there, were you?

A. I was somewhere around there.

Q. Well, if you were not in the office, where were you?

A. I might have been outside of the office.

Q. Were you outside of the office that night while the engineer was in the office?

A. I don't remember whether I was or not.

Q. Do you remember the operator talking to the dispatcher after the engineer came into the office?

A. No, sir.

Q. Do you remember the operator at Mile Post 426 telling the engineer any orders that he had received from the dispatcher?

A. No, sir, I don't remember.

89 Q. Did you go into the office with the engineer?

A. Yes, sir.

Q. How long did you stay in the office with the engineer?

A. I don't know.

Q. How long did the engineer stay in there?

A. I don't know that.

Q. Who left the office first, you or the engineer?

A. I don't know.

Q. Do you remember any of the conversation that occurred in the office between the engineer and the dispatcher there with reference to orders?

A. No, sir.

Q. After the engineer went out of the office there, where did he go?

A. I supposed he went back to his engine.

Q. Did you go with him?

A. No, sir.

Q. Why didn't you?

A. Because I staid in the office.

Q. Your duty was out with the crew, wasn't it?

A. Yes, sir.

Q. Why didn't you go out there with them?

A. Because I was soaking wet and I staid in the office to get warmed up a little.

Q. Were you cold?

A. Yes, sir.

Q. Was it cold that night?

A. Yes, sir.

Q. What was your physical condition there about being chilled?

(Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception.)

90 A. I was very near froze to death.

Q. And that was the reason you staid in the office, wasn't it?

A. Yes, sir.

Q. The facts were you couldn't have done much work if you had gone out, could you?

A. Well, I might have and I might not.

Q. But you thought that you had better stay in the office?

A. Yes, sir.

Q. Now, what had caused your condition that night?

A. The storm.

Q. How long did you stay in the office there?

A. I don't know.

Q. About how long?

A. Well, I don't know how long I did stay there.

Q. Did you stay there a half-hour?

A. I guess I did.

Q. An hour?

A. I don't know; it might have been a half an hour and it might have been an hour.

Q. What was the occasion of your leaving the office?

A. I left the office when the train was ready to go to Sidney.

Q. Well, you had been outside of the office before that, had you not?

A. Why, I had been, yes.

Q. I mean, how long did you remain in the office after Engineer

Zalusky left after receiving his orders, before you went outside of the office?

A. I don't know.

Q. Do you say it might have been a half an hour and might have been an hour?

A. Yes, sir.

91 Q. What was the occasion of your stepping out first?

A. I remained in the office until they notified me the train was ready to leave for Sidney and asked me if I was going.

Q. When did you learn that 501 had telescoped the caboose of 504?

A. When Brakeman McGinnis notified us at the office.

Q. Did you step out then?

A. I don't know whether I did or not.

Q. Did you see the fire?

A. No, sir.

Q. Why didn't you see the fire?

A. I don't remember about looking. I don't know that a person could see it.

Q. You don't know if you could have seen it if you had looked. Is that what you mean to say?

A. Yes, sir.

Q. And what would have prevented you?

(Objected to as incompetent, irrelevant, immaterial, and calling for the opinion of the witness. Sustained. Exception.)

Q. Was it storming at that time?

A. Yes, sir.

Q. Just as bad as ever it had been?

A. Yes, sir.

Q. Were you out assisting Engineer Zalesky and his fireman and Conductor McConaghy and his crew to put the engine from 510 on to train 504?

A. No, sir.

Q. You don't know what occurred out there?

A. No, sir.

Q. Where did the headlight go out on your train?

A. I don't know.

92 Q. Do you remember whether it did go out or not?

A. No, sir.

Q. How far could you see through the snow that night, Mr. McManus?

A. I don't know.

Q. You testified before the coroner's jury, didn't you?

A. I believe I did.

Q. Well, now, you haven't forgotten about that, have you? Have you forgotten whether you did or not?

A. Yes, I was there.

Q. But I asked you if you testified at the coroner's inquest, before the coroner's jury after this wreck occurred.

A. Yes, sir.

Q. Now, the matter was on your mind fresh at that time, wasn't it?

A. Yes, sir.

Q. How soon after the accident was it?

A. The second day, I believe.

Q. Now, in order to refresh your memory about that snow, I will ask you if at the coroner's inquest this question was not asked you—

(Defendant objects to counsel proceeding in this manner with the witness for the reason that it is leading and suggestive and not a proper manner in which to refresh the recollection of the witness, and incompetent. Sustained. Exception.)

Mr. Halligan: Well, can't I even ask the question?

By the Court: Yes, you may ask the question.

Mr. Ellick: It appears that counsel is going to read from a record which he now has in his possession, disclosing to the jury certain testimony which counsel will claim was given by this witness
93 at the coroner's inquest, for the ostensible purpose of refreshing the recollection of this witness, the real purpose being apparent to be to impeach his own witness, and I object to this manner of proceeding for the reason that it is not a proper manner in which to refresh the recollection of this witness and for the further reason that it is an attempt on the part of counsel to impeach his own witness.

Mr. Halligan: I want to disclaim the motives attributed to me by Mr. Ellick.

By the Court: Objection sustained.

Mr. Halligan: Then I can't even ask him the question?

By the Court: Let me see the question. The court's ruling is withdrawn and the objection is overruled.

Defendant excepts.)

Q. Now, in order to refresh your memory as to what occurred there as to the condition of the storm that night, I will ask you if at the time you testified at the coroner's jury this question was not asked you: "How far could you see through that snow that night?"

(Objected to for the same reasons as stated in the objection to the preceding question. Overruled. Exception.)

A. I don't know how far I could see.

Q. The question is, was that question asked you when you testified before the coroner's jury?

A. I don't remember whether it was or not. It might have been and it might not have been.

94 Q. And I will ask you further for the purpose of refreshing your memory if you did not reply: "It was just impossible to see at all."

(Objected to as incompetent, irrelevant, immaterial, leading, suggestive, and an attempt to impeach his own witness, and not a proper manner in which to refresh the recollection of a witness. Sustained. Exception.)

Q. Did you go up to the fire when this caboose was burning on 504?

A. No, sir.

Q. Why didn't you go up there?

(Objected to as calling for a conclusion of the witness. Sustained. Exception.)

Q. I will ask you what prevented you from going up to where that caboose and those cars were burning.

(Objected to as calling for a conclusion of the witness. Overruled. Exception.)

A. The condition of my clothes being wet.

Q. State if the storm had anything to do with it.

(Objected to as calling for a conclusion of the witness. Overruled. Exception.)

A. Yes, sir.

Q. About what time was it that you arrived at Mile Post 426?

A. Somewhere between 3:30 and 4 o'clock.

Q. Of day or night?

A. In the morning.

Q. That was in the night time?

A. Yes, sir.

Q. Now, I will ask you, Mr. Witness, when you and Mr. Zalesky went to the dispatcher's office, as you say you did, what did
95 Mr. Zalesky tell the operator to tell the dispatcher?

(Objected to as incompetent, irrelevant, immaterial, and repetition. Overruled. Exception.)

A. I don't know.

Q. Can't you make an effort and see if you can't remember what Mr. Zalesky told the operator to tell the dispatcher?

A. (No answer.)

Q. Can't you try and remember what he said?

A. (No answer.)

Q. Now, in order to refresh your recollection, I will ask you if when you testified before the coroner's jury, as you say you did, a day or so afterwards, you didn't say that when you and Mr. Zalesky went in there Mr. Zalesky told the operator to tell the dispatcher that you were all nearly frozen to death.

(Mr. Ellick: Objected to as incompetent, irrelevant, immaterial, leading, suggestive, and not a proper way in which to refresh the recollection of the witness as to his testimony at the coroner's inquest, and an attempt on the part of counsel to impeach his own witness.)

Mr. Rich: And for the further reason that the record that Mr. Halligan holds in his hand shows that that is not true.

Mr. Halligan: Well, I dispute that fact. I say that this record shows just what I said it does.

Mr. Rich: Yes, but it doesn't say that that is what the engineer

96 said. That was when he went up to the depot the first time, and he has already covered that in his testimony. Question withdrawn.)

Q. In order to refresh your memory as to what occurred in the depot at Mile Post 426, I will ask you if you did not testify before the coroner's jury, at the time that you stated you did, that you were all pretty near frozen to death and for that reason you couldn't pick up engine 510.

(Mr. Rich: Objected to for the reason that it does not fix the time, whether it was when the witness went up to talk with the dispatcher the first time or when he went to the depot with the engineer the second time. Sustained. Exception.)

Q. In order to refresh your memory as to what occurred in the depot at Mile Post 426, I will ask you if you did not testify before the coroner's jury, at the time that you stated you did, that you were all pretty near frozen to death and for that reason you couldn't pick up engine 510, this being the second time you went to the station?

(Objected to as incompetent, irrelevant, immaterial, leading, suggestive, and not a proper manner in which to refresh the recollection of the counsel's own witness, and an attempt to impeach his own witness, the record from which he is reading not having been in any way identified in this case. Question withdrawn.)

Q. I refer to any time you went to the station at 426.

(Question withdrawn.)

Q. I will ask you, Mr. Witness, for the purpose of refreshing your memory, if you didn't testify before the coroner's jury, 97 which as you have stated was one or two days after the accident occurred, that at one time when you went to the station at 426 you told the operator to tell the dispatcher that you had about all you could do, all you could handle, and that you were pretty nearly frozen to death.

(Objected to as incompetent, irrelevant, immaterial, leading, suggestive, and not a proper manner in which to refresh the recollection of the counsel's own witness, and an attempt to impeach his own witness, the record from which he is reading not having been in any way identified in this case. Overruled. Exception.)

A. I don't remember of making the statement at all.

Q. I will ask you about how far you were, when you were at the station at Mile Post 426, from the place where the wreck occurred.

A. About 35 or 40 car-lengths.

Q. About what time did you leave Mile Post 426 for Sidney?

A. I don't know.

Q. Give us your best recollection about it. Answer the question.

A. Well, I don't know.

Q. Well, was it the next forenoon, or the next day, or two days, or three days?

A. It was the same morning.

Q. Some time in the forenoon, was it?

A. Somewhere between three o'clock in the morning and eight. I don't know just what time it was.

Q. Did you leave up there before the relief train, the wrecking train, arrived?

A. Yes, sir.

98 Cross-examination by Mr. Ellick:

Q. Now, the engineer has charge of the head end of the train, does he?

A. Yes, sir.

Q. And the conductor has charge of the rear end of the train and also of the entire train?

A. Yes, sir.

Q. And when there is a difference of opinion as between the engineer and the conductor as to what should be done in the handling of the train, the conductor's word is final. Isn't that correct?

(Objected to as not the best evidence. Overruled. Exception.)

A. Why, yes, the conductor's word goes first.

Q. Was there any other train met your train westbound that night besides second Number Nine that you remember?

A. Yes, sir.

Q. What train was that?

A. 261.

Q. Where did you meet that train?

A. Just topping the hill west of Archer on the double track.

Q. Do you recollect meeting passenger train Number Seven?

A. I remember about meeting some passenger train at Bushnell.

Q. Second Number Nine is a mail train, is it?

A. Yes, sir.

Q. And that was the train that you met at Dix, Nebraska?

A. Yes, sir.

Q. When your train and train 501 were at Dix, you say that your engine was some distance west of the engine of 501?

A. Yes, sir.

99 Q. Engine 501 had pulled into Dix after your train had pulled in?

A. Yes, sir.

Q. And had pulled by you until the rear of the tender of engine 501 was opposite the point of the pilot of your engine; is that correct?

A. Well, it was somewhere about that.

Q. They were about an engine length ahead of your train?

A. Yes, sir. I think just about an engine length.

Q. And the pilot of your engine was about 130 or 140 feet from the switch; is that correct?

A. Yes, sir.

Q. That is, from the first switch from your engine, the first switch east?

A. I meant from the second switch on the main line.

Q. The switch that you were cleaning out while you were at Dix?

A. Well, we cleaned two switches out.

Q. The sidetrack at Dix is between the main-line tracks?

A. Yes, sir.

Q. And that track branches off at the east end of the sidetrack, with a track running and connecting with the westbound track and also a track extending over and connecting with the eastbound track, is that correct?

A. Yes, sir.

Q. And at the point where this sidetrack, as you might say, branches out toward the main-line tracks, there is a switch at that point?

A. Yes, sir.

Q. And then there is another switch where this track connects up with the main-line track?

A. Yes, sir.

100 Q. That makes your two switches?

A. Yes, sir.

Q. Were you using any fuses at the time you were cleaning out these switches at Dix?

A. Yes, sir.

Q. You were burning the ordinary fuse that is supplied by the company upon that occasion, were you?

A. Yes, sir.

Q. And they burned all right in that storm there that night?

A. Yes, sir.

Q. How long will one of those fuses burn?

A. Ten minutes.

Q. They are guaranteed to burn ten minutes, are they?

(Objected to as incompetent, irrelevant, and immaterial. Sustained. Exception.)

Q. Do they frequently burn longer than ten minutes?

(Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception.)

A. I don't know.

Q. When you got to Dix I believe you said that you left your engine and went back the entire length of your train for the purpose of inspecting the train. Is that correct?

A. Yes, sir.

Q. And when you got to the rear of the train you met Mr. Phillips, the conductor of your train. Is that correct?

A. Yes, sir.

Q. And I believe you testified that at that time Mr. Cradit was in the caboose of your train?

A. Yes, sir.

Q. Did you go into the caboose yourself?

A. Yes, sir.

101 Q. Was there a stove and a fire in the caboose?

A. Yes, sir.

Q. Who was protecting that train at Dix at that time, the rear end of the train?

A. Flagging, you mean?

Q. Yes.

A. No one.

Q. Nobody was flagging the rear end of the train?

A. No, sir.

Q. Didn't the rules of the company require that somebody flag the rear end of that train at that stop?

A. No, sir.

Q. Why not?

A. Because we were on a siding.

Q. If you had been on the main line, would the rules of the company have required somebody to flag?

(Objected to as immaterial and not proper cross-examination. Overruled. Exception.)

A. Yes, sir.

Q. Being in on that siding then, the rear end of the train would be protected by the block signal. Is that the reason why they were not required to flag? Or would it be by the switch?

A. Well, it would be by both. The block signal would be clear and the switch would be closed. If the switch was open, the block signal would be out.

Q. If a person were coming down on a train from the west that night, or any night, could they see whether the switch was open or closed by looking at the rails as they came along?

A. On a train in motion, you mean?

102 Q. Yes.

A. No, sir.

Q. So that they would depend upon the block signal to determine whether or not the switch was open or closed for them; is that correct?

A. Yes, sir.

Q. Did Mr. Cradit remain in the caboose all of the time that you were at the rear end of that train?

A. Yes, sir.

Q. He didn't go out of the car at all?

A. Not that I know of.

Q. How long did you stay in the caboose on that train?

A. I don't know.

Q. Well, have you any idea of about how long you staid?

A. I don't think over five minutes.

Q. And then you went to the head end of your train or to the depot with Mr. Phillips?

A. Yes, sir.

Q. To which did you go, the head end of your train or to the depot?

A. Both.

Q. Did you go to the depot first?

A. No, sir.

Q. You went up to the head end of your train first?

A. Yes, sir.

Q. And then went back to the depot?

A. The depot was right east of the train.

Q. How far east of the front of your train?

A. I don't know.

Q. Well, give us your best judgment as to how far.

103 A. Two or three telegraph poles; maybe more and maybe less.

Q. Had train 501 pulled into Dix by the time you got back to the head end of your train?

A. Yes, sir.

Q. When did it get to Dix with reference to the time that you got back to your train, or how long before?

A. I don't know.

Q. They pulled in on the south side of your train, did they?

A. Yes, sir.

Q. And you didn't see them when they came in?

A. I believe I was at the office.

Q. Well, then, that was after you had returned to the head end of your train and had gone over to the railroad station, is that correct?

A. That 501 pulled in?

Q. Yes.

A. Yes, sir.

Q. Now, after you left the office what did you do?

A. I don't remember.

Q. Well, did you go back to your engine, or did you go to the switches?

A. I went up in there somewhere. I don't remember just what I did do next.

Q. You don't remember whether you went back to your engine or whether you went up to start cleaning out the switches?

A. No, sir.

Q. You might have gone direct from the station at Dix to the switches to start cleaning out the switches. Is that correct?

A. I might have.

Q. And when you started to clean out the switches, were you engaged in that work until your train pulled out of Dix?

104 A. Not all the time.

Q. Well, what were you doing when you were not engaged in that work?

A. On the engine part of the time.

Q. How much time did you spend on the engine?

A. I don't know.

Q. How long were you at Dix?

A. I don't know.

Q. Well, have you any idea?

A. No, I haven't.

Q. Were you there a half-hour or an hour?

A. We were there an hour all right anyway.

Q. And during the time that you were there, most of your time was spent in examining the train and in cleaning out the switches and going to and from the station?

A. Yes, sir.

Q. So that you were out in the storm considerable at Dix?

A. Yes, sir.

Q. Practically all of the time that you were there?

A. No, not all the time.

Q. But I say practically all the time that you were at Dix you were out in the storm, were you, nearly all of the time?

A. Yes.

Q. Do you know what the temperature was at that time?

A. No, sir.

Q. Was the snow that was falling a wet snow?

A. Yes, sir.

Q. And the storm was as severe, if not more severe, when you were at Dix than at the time of the wreck, wasn't it?

A. I don't remember.

105 Q. Well, what do you say? What is your best judgment as to whether it was about the same?

A. I should judge it would be about the same.

Q. You didn't notice any difference in the storm as it was when you were at Dix than as it was at the time of the wreck?

A. No, sir.

Q. Now, the snow that night as it fell on your person would melt; is that correct?

A. Yes, sir.

Q. And that is what saturated your clothing?

A. Yes, sir.

Q. You were out in the storm more than any other member of your crew; is that a fact?

A. Well, I was out more than any one of the three on the head end.

Q. You did practically all of the outside work for the head end of your train?

A. Yes, sir.

Q. And nobody at the head end of the train exchanged off with you in that work?

A. Not of the engine crew, no, sir.

Q. So that whenever your train stopped at any place you were obliged to be out and off of the engine nearly all of the time that it stopped?

A. Yes, sir.

Q. This locality is subject to snow storms, is it not, during the winter time?

A. Yes, sir.

Q. And it frequently happens that you are obliged to clean the snow out of switches in the winter time, does it not?

A. Yes, sir.

106 Q. Was your clothing saturated at Dix, Nebraska, from the melting snow?

A. Yes, sir.

Q. And did you secure protection from the wind and storm in your engine cab?

A. Yes, sir.

Q. Did you secure absolute protection from the wind, or did the wind blow into the cab during that storm?

A. It did.

Q. You were not as secure from the elements in the cab of the engine then as you would have been if you were in a caboose?

A. No, sir.

Q. Is it not — fact that when you were on the engine after leaving Dix that you were devoting most of your time to getting warm?

A. Yes, sir.

Q. And were not paying much attention to observing the block signals?

A. No, sir, I wasn't.

Q. You were not undertaking that work at all?

A. No, sir.

Q. You were leaving that duty to Mr. Zalesky, the engineer, and Mr. Cunningham, the fireman; isn't that a fact?

A. Yes, sir.

Q. Mr. Zalesky saw the signals, didn't he?

A. I don't know.

Q. So that you made no effort to see the block signals from Dix to Mile Post 426 on account of your condition?

(Objected to as repetition. Sustained. Exception.)

Q. And is that the reason why you didn't hear the train when it passed the station at Herdon? Didn't hear the train
107 passing that station, I mean, when you passed at Herdon?

(Objected to as calling for a conclusion of the witness. Overruled. Exception.)

A. (No answer.)

Q. Do you understand the question?

A. No, not exactly.

Q. You said that you were devoting your time on the engine after leaving Dix to keeping warm and were not watching the block signals. You also testified in your examination in chief that you didn't hear the train when it passed the station at Herdon. Now, was that on account of the reason that you were attempting to get warm at that place?

(Objected to as calling for a conclusion of the witness. Overruled. Exception.)

A. Yes, the same reason.

Q. And is that the same reason why you didn't hear the train when it passed over the bridge east of Herdon?

(Objected to as calling for a conclusion of the witness. Overruled. Exception.)

A. Yes, sir.

Q. You were not watching for any landmarks or listening for any landmarks?

A. No, sir.

Q. You said that the block signals west of Mile Post 426 have been changed since the wreck. Is that due to the fact that they have since that time instalied a double track west of Herdon?

A. Yes, sir.

Q. And that necessitated the change of the block signals?

A. Yes, sir.

108 Q. I believe you said on direct examination that you thought your train stopped six or seven cars east of the depot at Mile Post 426. Are you certain about that, or might it have been a less distance than that?

A. It might have been less and might have been more.

Q. That is just a guess that you are making on that proposition, is it? You didn't measure it, in other words?

A. No, sir.

Q. And you didn't count the cars?

A. No, sir.

Q. Were you able to dry your clothes on the engine after leaving Dix before you reached Mile Post 426, or were they still wet when you got to Mile Post 426?

A. They were still wet.

Q. You got off of your engine at Mile Post 426 and went back into the station, did you?

A. Yes, sir.

Q. And made two trips back and forth?

A. Yes, sir.

Q. How was that station at Mile Post 426 constructed, the interior, how was it arranged? One or two rooms?

A. It had two rooms.

Q. And was one of them an outer office?

A. They didn't use it for anything.

Q. And what was the other room used for?

A. For the depot.

Q. In which part of the building was the operator stationed?

A. In the east part.

Q. And in what part of the building did you go when you went into the station?

109 A. Where the operator was working.

Q. Into the east part of the car?

A. Yes, sir.

Q. And where was the stove located in the car?

A. In the northwest corner of the east part.

Q. Now, after you had made your second report to Mr. Zalesky and had gone back to this station, you remained in the station, did you?

A. I don't remember what I did do.

Q. Did you sit at the stove drying your clothes after you returned?

A. I did while I was in there.

Q. While you were in there you staid around the stove?

A. Yes, sir.

Q. Now, you say that you didn't go to the fire on account of the

condition of your clothes and the storm. Do you mean on account of the condition your clothes had got into because of the storm?

A. Yes, sir.

Redirect by Mr. Halligan:

Q. Now, this station at 426 was just a box-car, wasn't it?

A. Yes, sir.

Q. And these two rooms, you say; was it a box-car divided up?

A. Yes, sir.

Q. Where was the last time that you saw Mr. Cradit alive?

A. At Dix.

Q. In his caboose there?

A. Yes, sir.

110 Q. That is the last time you saw him, was when he was in his caboose?

A. Yes, sir.

Q. Now, you don't know how much he and Conductor Phillips were out in the storm?

A. Not after we left Dix, no, sir.

Q. Nor before they got there, you don't know?

A. Well, Conductor Phillips was with me there at Dix.

Q. But you don't know how much Cradit was out at Bushnell and these other stations?

A. He was out at Bushnell and inspected the train. We both inspected it at Bushnell.

Q. And this snow that was falling would freeze on you too, wouldn't it?

A. Yes, sir.

Q. It would fall and thaw on you and then freeze?

A. Yes, sir.

Q. And when you were going up along the train, when it fell on your face, how would it form there?

A. Why, it would stick to your face.

Q. And freeze there?

A. Not exactly freeze, but just stick to your face.

Q. What was the condition of Conductor Phillips' clothes when he was out there with you?

A. I don't know.

Q. And did you notice Cradit's clothing?

A. Not to remember.

Q. Had you left the caboose at Dix on your train before 501 pulled in?

A. Yes, sir.

111 Q. I think you said you were in the station when 501 pulled in?

A. Yes.

Q. And after that you got out just as soon as you could make arrangements to go?

A. Yes, sir.

Q. How far was the engine of your train from the first switch, the switch nearest to the engine, about?

A. You mean the front end of the engine?

Q. Yes.

A. I don't know.

Q. Make the best estimate you can.

A. Probably thirty feet, more or less.

Q. Who set the switch to run your train in on the siding at Dix?
Who threw the switch?

A. I did.

Q. And then did you get on the engine?

A. No, sir.

Q. What did you do then?

A. I let the train pull by me.

Q. And did you stop and close the switch then?

A. No, sir.

Q. When did you get on the train?

A. After the switch was closed.

Q. Didn't you get on the train until the train had gone by you?

A. I caught the caboose.

Q. Then is this right, that you didn't walk from the engine back to the rear end?

A. No, sir.

Q. You threw the switch?

A. Yes, sir.

112 Q. And waited there until the caboose went by, and then threw the switch for the main-line track?

A. No, sir.

Q. Who did throw that switch?

A. I don't know. I didn't.

Q. Whose duty was it?

A. The rear brakeman's.

Q. That was Mr. Cradit?

A. Yes, sir.

Q. Did you see him out at that time?

A. No, sir.

Q. How far did the caboose run from that switch before it stopped.

A. I don't know.

Q. About how far? Give us your best judgment, how many car-lengths, or any way you want to fix it.

A. Somewhere between twenty and forty car-lengths.

Q. When you jumped on the caboose was Cradit on there then?

A. Yes, sir.

Q. Did he get off to set that switch before the train stopped?

A. I don't know.

Q. Did you see him get off?

A. No, sir, I didn't.

Q. Did you go away and leave that switch open so that 501, if it followed you, would take the switch and run into your train?

A. I don't just understand the question.

Q. Did you leave that switch open there so that 501 following

you would take the switch and run into the rear end of your train?

A. No, sir, I opened the switch for our train.

113 Q. And did you leave it open?

A. I did.

Q. And what do you know about closing it?

A. I don't know anything about closing it.

Q. Where was the caboose with reference to the switch when you got on to the caboose?

A. I don't just know. I walked down a ways east toward the depot.

Q. And then as the caboose went by you, you got on that?

A. Yes, sir.

Q. And you say Cradit was on there when you got on?

A. Yes, sir.

Q. And he didn't get off as long as you staid there?

A. I don't know. He could have got off before I caught the caboose and shut the switch and then got back on.

Q. When you threw the switch for your train, then you walked down along the track?

A. Yes, sir.

Q. And when the caboose overtook you, you got on the caboose?

A. Yes, sir.

Q. And Mr. Cradit might have got off the caboose and thrown the switch for the main line and got on the caboose before you got there?

A. Yes, sir.

Q. Now, when you were on the siding there, with the switch properly thrown, it was not necessary to put out a flagman was it?

A. No, sir.

Q. Now, the fact that when 501 came into Dix it continued on the main line and didn't run down on to the same siding that you were on, shows that some one shut the switch, doesn't it?

114 A. Yes, sir.

Q. Are you still in the employ of the Union Pacific company?

A. Yes, sir.

Recross-examination by Mr. Ellick:

Q. It was no part of your duty to close that switch there?

A. No, sir.

Q. And the only man you saw out at the rear end of that train was Phillips, the conductor?

A. Yes, sir.

Q. Mr. McManus, how were you dressed on the night of this wreck?

A. I was dressed in a blue serge suit.

Q. Did you have on an overcoat or outer coat of any kind?

A. Just a small coat like I have on here now.

Q. Just an ordinary sack coat?

A. Yes, sir.

(Witness excused.)

115 JAMES CUNNINGHAM, called as a witness on behalf of the plaintiff, and duly sworn, testified as follows:

Direct examination by Mr. Halligan:

Q. Give your name to the reporter.

A. James Cunningham.

Q. Where do you live, Mr. Cunningham?

A. Cheyenne, Wyoming.

Q. And what is your occupation?

A. Locomotive fireman on the fourth district of the Nebraska division of the Union Pacific.

Q. And are you employed by the company at this time?

A. Yes, sir.

Q. Were you so employed on the 14th of March, 1913?

A. Yes, sir.

Q. On that day were you called to make a run from Cheyenne?

A. Yes, sir.

Q. What time did you leave Cheyenne?

A. Between six and seven o'clock.

Q. What kind of a train were you on?

A. Stock train.

Q. And where was the train going from and to?

A. From Cheyenne to Sidney.

Q. Cheyenne, Wyoming, to Sidney, Nebraska?

A. Yes, sir.

Q. What was the number of your engine?

A. Engine 504.

Q. And what was the number of the train that you took out with that engine?

A. Extra 504 East.

116 Q. Who was your engineer?

A. Engineer James Zalesky.

Q. And who was your conductor?

A. Conductor Ray Phillips.

Q. Who was the head brakeman?

A. George McManus.

Q. That is the witness who has just preceded you?

A. Yes, sir.

Q. And who was the rear brakeman?

A. Mr. Cradit.

Q. About what time did you leave Cheyenne?

A. I don't know just exactly, but it was between six and seven o'clock.

Q. In the evening of the 13th?

A. Yes, sir.

Q. And about how many cars did you have in that train?

A. Between forty and forty-five.

Q. And what were they loaded with?

A. Sheep.

Q. What was the condition of the weather at the time you left Cheyenne?

A. Snowing a little and blowing.

Q. What conditions of weather prevailed as you came east?

A. Well, it was probably about the same for forty-three miles, and then it began to get a little bit more snowy.

Q. From what point did the storm begin to increase?

A. From Pine Bluffs east.

Q. About what time did you get to Pine Bluffs?

A. I don't know exactly what time it was.

Q. You don't remember the time?

A. No, sir.

117 Q. And what was the condition of the weather at that point?

A. Well, it was snowing quite a little bit and blowing just the same.

Q. How long did you remain at Pine Bluffs?

A. We didn't stop at Pine Bluffs.

Q. Where did you stop?

A. At Bushnell.

Q. How long did you remain there?

A. About an hour and a half.

Q. And what was the condition of the weather when you got to Bushnell?

A. Snowing and blowing.

Q. To what extent was it snowing?

A. Why, it was snowing pretty hard. The wind was just about the same all the way.

Q. How was the wind?

A. About the same from the time we started.

Q. Tell how hard, as nearly as you can, and in your own language, how hard was the wind blowing?

A. Well, I couldn't judge very well, but I guess it was blowing maybe thirty miles an hour.

Q. Were you out in the wind any, in the storm?

A. I took water at Bushnell.

Q. And what effect did it have upon a person that went out in the wind? Did it interfere with walking to any extent?

A. Why, it kind of interfered with me on the top of the tank, but I don't know how it would be on the ground.

Q. To what extent did the snow interfere with your ability to see that night at Bushnell?

A. Why, I could see a little ways all right.

118 Q. About how far could you see?

A. Probably about a car and a half length.

Q. And what could you see at that distance? Could you see a light?

A. Yes, sir, if it was burning very bright.

Q. Could you see an ordinary railroad man's lantern at that distance?

A. I believe so. I never had an occasion to look for any, though.

Q. Now, what other trains were at Bushnell at the time you were there, if any?

A. No other.

Q. And how many trains passed you while you were at Bushnell?

A. One train.

Q. What was that train?

A. Number One, the Overland Limited.

Q. That is a passenger train?

A. Yes, sir.

Q. After Number One passed you what did you do?

A. We had orders then to take up to Kimball.

Q. Did you stop at Kimball?

A. Yes, sir.

Q. What was the condition of the storm when you arrived at Kimball?

A. Practically the same as at Bushnell.

Q. Did you get out of the engine at Kimball?

A. No, sir.

Q. What members of your train crew did you see at Bushnell?

A. Conductor Phillips and our head brakeman.

Q. And who did you see at Kimball?

A. Just our head brakeman and the operator.

119 Q. Where was the last time that you saw Rear Brakeman Cradit alive?

A. I never saw him that evening at all.

Q. I believe you said you stopped at Kimball?

A. Yes, sir.

Q. When you got to Kimball what was the condition of your headlight?

A. I supposed it was burning. I didn't know for sure whether it was or not. I didn't find that out until I went to Dix.

(Plaintiff moves to strike out the last sentence of the answer as not responsive. Sustained. Exception.)

Q. Were you out around your engine that night at Kimball?

A. No, sir; we just stopped and started at Kimball.

Q. You didn't stay long there?

A. No.

Q. About what time was it when you arrived at Dix?

A. About 1:30, I should judge. I don't know for sure.

Q. 1:30 at night, on the night of the 13th?

A. Yes, sir, 1:30 A. M.

Q. What did you do there at Dix?

A. When we arrived at Dix what did we do?

Q. Yes.

A. We took siding at Dix and waited until Number Seven arrived, and then we proceeded.

Q. What was the condition of your headlight when you arrived at Dix?

A. It was out.

Q. What did you do with reference to your headlight there?

(Objected to as incompetent, irrelevant, and immaterial, the peti-

120 tion of the plaintiff not presenting any issue of negligence on the part of the company with reference to the headlight. Overruled. Exception.)

A. Why, I went out to fix the headlight, and it happened to be froze, so I replaced a white lantern as a substitute for the acetylene headlight.

Q. How did you do that?

A. I pulled out the reflector and placed the lantern in the place where the burner is, and then pushed the reflector back in again and closed the door.

Q. And from that point east you proceeded with the white lantern for a headlight?

(Objected to as incompetent, irrelevant, and immaterial, and for the further reason that the petition does not sufficiently charge the company with operating the train with an insufficient headlight on the night in question. Overruled. Exception.)

A. Yes.

Q. What kind of lantern is the white lantern?

(Objected to as incompetent, irrelevant, and immaterial, and for the further reason that the petition does not sufficiently charge the company with operating the train with an insufficient headlight on the night in question. Overruled. Exception.)

A. It is a lantern used by brakemen.

Q. The ordinary railroad hand lantern, is it?

A. Yes, sir.

Q. I believe you stated you pulled in on the sidetrack when you got to Dix?

A. Yes, sir.

121 Q. Now, is the road west of Dix a double or a single track?

A. Double.

Q. And which track were you coming down, the north or the south track, as you came east?

A. The south track.

Q. And how far from Dix is the west switch of this sidetrack?

A. About ninety cars.

Q. And who opened the switch for you to run you in on the sidetrack?

A. Brakeman McManus.

Q. How long were you at Dix?

A. About an hour.

Q. Were you in the station while you were at Dix?

A. No, sir.

Q. Where were you during that time?

A. I was at the engine at all times.

Q. Did you leave the engine cab while you were there?

A. Not any more than to go and examine the headlight and fix that.

Q. And then you returned to the cab and staid there?

A. Yes, sir.

Q. Did you see Conductor Phillips at Dix?

A. Yes, sir.

Q. Where was he?

A. He came up from the rear end after we were on the siding waiting.

Q. Who was with him when he came up?

A. George McManus, the head brakeman.

Q. And where did he go then? Did he get up in the engine?

A. No, sir. He came to the gangway.

Q. What did McManus do?

A. He came along with him.

122 Q. Did he get in the engine?

A. He staid on the outside.

Q. And did they leave together?

A. Yes, sir.

Q. Do you know where they went?

A. They went to the office.

Q. That is, the office in the station at Dix?

A. Yes, sir.

Q. How long were they gone?

A. Oh, a matter of about fifteen minutes.

Q. When they came down from the rear end of the train, had 501 East pulled up at that time?

A. No, sir.

Q. How soon after they came back was it before 501 East pulled up?

A. Oh, about ten minutes.

Q. And they were in the station at the time it pulled up?

A. They had left to go to the station. I don't know whether they were there or not.

Q. I understood you in answer to the last question to say that it was about ten minutes after they came down to your engine before 501 came up. Is that right?

A. Yes, sir.

Q. How long did they stay around the engine?

A. They didn't stay there any time at all.

Q. And they went over to the depot?

A. Yes, sir.

Q. Now, then, how long was it after they came back before you pulled out?

A. About thirty minutes, I guess.

Q. What were you waiting for?

A. Number Seven.

123 Q. Number Seven went through on the westbound track, the north track?

A. Yes, sir.

Q. How far was your engine from the engine of 501?

A. Why, they were standing pretty near side by side, 501 having a little the lead of us.

Q. Now, during the time that you were waiting for Number Seven, where was Conductor Phillips?

A. Conductor Phillips came down from the rear end and said he would go down and see what was doing, see whether we were going out or not. He went down and got orders, and he says, "We will leave as soon as Number Seven arrives." He delivered the orders to the engineer, and about that time Seven was about due there and they proceeded to clean out switches.

Q. How soon after he got back with the orders was it before Number Seven got there?

A. Why, I guess it was about ten or fifteen minutes. He said that the dispatcher told him Number Seven ought to be there——

(Defendant objects to what the dispatcher told him as hear-say and incompetent. Sustained. Exception.)

Q. Where did he stay from the time he came back until Number Seven came through? At your engine?

A. Why, he wasn't on the engine. I don't know where he was at. I supposed he was looking around outside.

Q. Was McManus on the engine during that time?

A. No, sir.

Q. Phillips and McManus were out around on the outside some place?

A. Yes, sir.

Q. Did you see them start to clean the switch when Number Seven went through?

124 A. No, I didn't see them, but they told us they were going to clean them.

Q. And how did you know that they had cleaned the switch?

A. They came back and told us that they had cleaned them and had them thrown for us to proceed.

Q. How far was that switch from your engine?

A. About a rail length, I should judge.

Q. Could you see the switch from the engine in the condition of the storm that night?

A. I don't know whether I could or not. I never looked. The switch had no switch lights on it anyway.

Q. Well, they had lanterns with them anyway?

A. Yes, sir.

Q. Did you see their lanterns when they were working at the switch?

A. I never looked for them.

Q. Well, you didn't see them then, did you?

A. No, sir.

Q. And they didn't start you out with a signal by their lanterns?

A. No, sir.

Q. You railroad men have that kind of a signal, have you, when you throw a switch?

A. Yes, sir.

Q. But that wasn't the way you started that night?

A. No, sir.

Q. Who was it came and told you that the switch was clear?

A. Conductor Phillips.

Q. Who was with him then?

A. I don't know. I never looked out to see.

Q. Did you see anyone else?

A. No, sir.

125 Q. Or hear anyone else out there but him and McManus?

A. No, sir.

Q. About what time was it that you left Dix?

A. Between 2:30 and 2:45, I judge.

Q. And what was the next station east?

A. Potter.

Q. Did you stop at Potter?

A. Yes, sir.

Q. How long did you stop at Potter?

A. All of fifteen minutes.

Q. Were you on the main line when you were at Potter?

A. Yes, sir.

Q. And where did you go when you were at Potter?

A. I took water at Potter.

Q. Where was it west of there that you took water?

A. Bushnell.

Q. You took water at Bushnell and water at Potter?

A. Yes, sir.

Q. Now, when you stopped at Potter, where did Brakeman McManus go?

A. He went to the office.

Q. The office in the station?

A. Yes, sir.

Q. And how long was he gone?

A. Why, he had returned when I got done taking water.

Q. And did he have any orders for you there?

A. Yes, sir.

Q. What were they, written or oral orders?

A. Written orders.

Q. Did you read the orders?

A. Yes, sir.

126 Q. What is done with the orders when they are delivered to the engine?

A. They are delivered to the engineer and he reads them, and then he hands them to the fireman to read. When the fireman get done reading them he returns them to the engineer.

Q. Why does the fireman have to read the orders?

A. To familiarize himself with the conditions that are going on.

Q. With the operation of that train and other trains that are in that vicinity?

A. Yes, sir.

Q. What was this order?

A. It was annulment of (interrupted)——

(Defendant objects to the question as incompetent and not the best evidence. Question withdrawn.)

Q. What did you do after receiving the order?

A. We proceeded to Mile Post 426.

Q. How soon after you got the orders did you proceed?

A. After reading them we proceeded.

Q. Immediately?

A. Yes, sir.

Q. You were on the main line and no switches to be thrown?

A. No, sir.

Q. Do you know about what time it was when you left Potter?

A. No, I don't.

Q. How many miles is it down to Mile Post 426?

A. About seven.

Q. About how long were you running those seven miles?

A. About twenty-two minutes, I believe.

Q. Now, did you look for any signals that night?

A. Yes, sir.

127 Q. Where did you look for signals?

A. At Pine Bluffs, Bushnell, Kimball, and at Dix.

Q. Did you look for any signals between Bushnell and Kimball?

A. No, sir.

Q. Did you look for any between Kimball and Dix?

A. No, sir.

Q. Or Dix and Potter?

A. No, sir.

Q. Why didn't you look?

A. Because I had pretty busy work to keep steam up, and other duties to look after.

Q. That is, you were firing the engine?

A. Yes, sir.

Q. Is it the duty of the fireman to watch for signals?

A. Yes, sir.

Q. And particularly a night like that, is it not his duty to watch for signals?

A. Where there is some obstruction in the way of the engineer, and where the engineer cannot see the blocks, it is the fireman's duty to look out for them.

Q. Was there any such places on the line that night?

A. Not that I know of, only around the Point of Rocks between Potter and Mile Post 426.

Q. Did you look for signals there?

A. No, sir, I was looking out to see if there was anything on the track as we were going around the point.

Q. How far could you see ahead of the engine that night?

A. I don't suppose I could see any, in the dark, ahead of the engine.

Q. Then what were you looking out for, if you couldn't see?

A. Looking out for fuses or lights.

128 Q. How far did your lantern that you had for a headlight throw the light out on the track?

A. I don't know. You couldn't see that at all.

Q. The track between Potter and Mile Post 426 is a single track, is it not?

A. Yes, sir.

Q. And how many block signals are between Point of Rocks and Mile Post 426?

A. There was either seven or eight, with two distance signals, I believe.

Q. Including the distance signals there were seven or eight?

A. Yes, sir.

Q. Tell the jury what a distance signal is?

A. It is a fixed signal in advance of the home signal, controlling the home signal.

Q. What do you call the home signal?

A. Just a stop signal.

Q. Where is the home signal located? Is there any particular place along the track?

A. Well, they are at the entrance to a siding or along between sidings.

Q. What do you call a block signal that is out along the main track where there is no siding or station?

A. An automatic block signal.

Q. You call that a block signal?

A. Yes, sir.

Q. A signal at a switch is a home signal?

A. Yes, sir.

Q. And every signal that is along where there is a switch is a home signal; is that right?

A. At the entrance to a siding.

129 Q. Well, do you call the signals at the entrance to sidings home signals, all of them?

A. Yes, sir.

Q. Now, then, where is the distance signal with reference to the home signal?

A. It is about a quarter of a mile from the home signal.

Q. Now, then, what lights in the night time are displayed by the home signal?

A. Red light.

Q. When does it display red light?

A. When the block is against the approaching train.

Q. And what does that indicate to the engineer?

A. To stop.

Q. What other lights besides a red light are used in the home signal?

A. Green light.

Q. What does the green light indicate?

A. Proceed.

Q. How many of these red and green lights were there between the Point of Rocks and Mile Post 426? How many blocks were there?

A. There must be about six of those blocks with the red lens in.

Q. And how many distance signals.

A. Two.

Q. What lights are displayed by the distance signals?

A. Yellow and green.

Q. When is the yellow light displayed at the distance signal?

A. When it is at caution and the arm is extended horizontally.

Q. What causes that to be yellow and the arm to be horizontal?

A. The block is not clear ahead.

130 Q. If there is a train on that, will it do that?

A. Yes, sir; or a switch thrown will do it too.

Q. What are the duties of the engineer when that distance signal displays yellow?

A. To reduce speed immediately and look out for home block signals.

Q. Which way from the home block is the distance signal?

A. Why, if you were coming east, it would be west.

Q. That is, you always approach the distance signal before you approach the home signal?

A. Yes, sir.

Q. And it is about how far from the home signal?

A. They vary a little bit. Most of them are about a quarter of a mile.

Q. Now, I believe you said that when the distance signal displayed a yellow light, it was the duty of the engineer to slow down his train?

A. Yes, sir.

Q. To what extent is he required to slow down?

A. So that he can be able to stop in the distance seen to be clear, if there is any obstruction in the way.

Q. That is what you railroad men call getting the train under control, is it?

A. Yes, sir.

Q. Now, then, the distance signal, when it shows yellow, indicates to the engineer to get his train under control?

A. Yes, sir.

Q. And that means to stop the train within the distance that he can see along the track to be clear?

A. If the home block is red he is supposed to be able to stop before he passes that block.

131 Q. Isn't that what it means to get your train under control, to stop within the distance you can see to be clear?

A. Yes, sir.

Q. And that is what he is supposed to do, isn't it?

A. Yes, sir.

Q. Now, was there a sidetrack at Mile Post 426?

A. No, sir.

Q. That was just the end of the double track?

A. Yes, sir.

Q. What kind of a block signal was there at Mile Post 426?

A. An automatic block signal; a home block.

Q. While we are on the question of signals, I will ask you if all of these signals, the home signal and the distance signal, are not all of them part of the system known as the automatic block signals?

A. Yes, sir.

Q. And these signals had been installed on the Union Pacific for a considerable time, had they not, at that time?

A. Yes, sir.

Q. Where with reference to the switch at Mile Post 426 was the home block signal?

A. The block signal that protected the switch was about eighty feet west of the switch.

Q. And where was that block signal with reference to the depot or station at 426?

A. About the same distance west of the depot.

Q. It was the same distance west?

A. Yes, sir.

Q. Where was the switch with reference to the depot?

A. Right in front.

132 Q. Right directly opposite where the depot was?

A. Yes, sir.

Q. Were you able to locate yourself on that night as you came down from Potter, as you came along the road?

(Objected to as incompetent, irrelevant, and immaterial, because the witness has said that he didn't attempt to except at one point. Overruled. Exception.)

A. Yes, sir, I could locate myself.

Q. Whereabouts did you do it?

A. We located right along.

Q. After you left the Point of Rocks, where did you locate?

A. We located for the mile posts.

Q. Did you see any mile posts after you left the Point of Rocks and before you got to Mile Post 426?

A. No, sir.

Q. Did you know when you went over the bridge at 426?

A. Yes, sir.

Q. Did you know where that bridge was?

A. Yes, sir.

Q. Is that the way you located yourself with reference to Mile Post 426?

A. Yes, sir.

Q. When you stopped your engine at 426, in which direction from the depot was the engine?

A. A little bit east of the depot.

Q. About how many car-lengths?

A. Why, I don't know, but I should judge from the way we went by, it was about three or four cars.

Q. Three or four car-lengths before you stopped your engine?

A. Yes, sir.

133 Q. Could you see the block signal at 426 from where you stopped your engine?

A. I never looked for it.

Q. Did you see the block signal at 426 as you went under it?

A. No, sir. I wasn't looking for it at all. The engineer was looking, and it was on his side.

Q. What did you do after arriving at Mile Post 426?

A. I didn't do anything at Mile Post 426 but just looked after my engine.

Q. What was done there at Mile Post 426?

A. After we stopped we whistled out a flag, and the engineer told the brakeman to go and get clearance on the board from the office.

Q. Were you there when the brakeman came back?

A. Yes, sir.

Q. Did you hear what the brakemen told the engineer?

A. Yes, sir.

Q. What did he tell him?

A. He said we would have to pick up engine 510 and put it in our train and take it to Sidney.

Q. Where was engine 510 at that time?

A. On the westbound main.

Q. And how close to you was it?

A. Why, I suppose it was two or three cars east of us.

Q. What did the engineer do after he was instructed to pick up engine 510?

A. He told the brakeman to go back and ask the dispatcher if he wouldn't have Extra 501 pick up this engine.

Q. And what did the brakeman do then?

A. The brakeman went back and asked the dispatcher, and the dispatcher told him to pick it up, and gave him a clearance
134 also at that time.

Q. What was done then?

A. Brakeman McManus came back to the engine and told Engineer Zalesky, and at the same time Conductor McConaghy told Brakeman McManus that he would cut off back there so as to give his engine clearance enough for our train. So he instructed Engineer Zalesky to pull down and we pulled on down.

Q. How far did you pull down?

A. So as to give that engine clearance enough to get back on our train.

Q. How long were you down there where you pulled down before this accident occurred?

A. It wasn't over five minutes altogether.

Q. How long was it after you arrived there before you cut your cars off of your train and pulled on down?

A. About pretty near ten minutes, I guess.

Q. When did you learn that there had been a collision?

A. When Brakeman McGinnis came down and told us in the office.

Q. Now, you have testified that the home block signal was, I think you said, two or three car-lengths east of the station at 426?

A. It is about the same distance as it is west. The home block for the westbound is just about the same distance from the depot as it is for the eastbound.

Q. Are there two home blocks at 426?

A. Yes, sir; one controlling west and the other controlling east.

Q. Well, I mean the one that controlled the eastbound train. That was west of the station, wasn't it?

A. Yes, sir.

135 Q. And you said that was two or three car-lengths?

A. I think it was about eighty feet.

Q. And that signal was a home block that displayed either a red or a green light?

A. Yes, sir.

Q. Now, then, the next block west of that, controlling the east-bound train, was located how far west?

A. About a mile.

Q. Well, would the distance signal act in about a mile?

A. Yes, sir.

Q. Wasn't there a distance signal?

A. There was a distance signal about a quarter of a mile from this block.

Q. The next signal west of the home signal, governing eastbound trains, was about a quarter of a mile from the home signal at 426?

A. Yes, sir.

Q. Where was the next block signal west of the block signal governing eastbound trains?

A. About one mile; the east switch at Herdon.

Q. Was Herdon a station? That is, was there a depot there?

A. They have a car there.

Q. Let me ask you this: Was there a semaphore at either 426 or Herdon?

A. There was a semaphore at 426, but none at Herdon.

Q. Tell the jury what a semaphore is. That is a signal that is right at the station, isn't it?

A. It is what they call an order board.

Q. Well, it is a signal, isn't it?

A. Yes, sir.

136 Q. How is that signal controlled, the order board?

A. Why, it is controlled manually, by the operator.

Q. Worked manually by the operator in the station?

A. Yes, sir.

Q. And the other block signals that you described here are worked how?

A. By electricity.

Q. And they work automatically?

A. Yes, sir.

Q. Now, there was a semaphore or order board at 426?

A. Yes, sir.

Q. But there was none at Herdon?

A. No, sir.

Q. What lights are displayed in the night time by the order board or semaphore at the station?

A. Red.

Q. Do they always display red light?

A. When the office is open it is always a red light.

Q. When an engineer comes to the station the order board is always red?

A. Yes, sir.

Q. What does that indicate?

A. Orders, or to stop there.

Q. *How*, what does the engineer do as he approaches the order board?

A. He whistles four short blasts of the whistle.

Q. And what is that for?

A. A call for signal.

Q. That is, for the signal from the operator in the station?

A. Yes, sir.

137 Q. After these signals what does the operator do?

A. If he has no orders he drops the board and it displays

green.

Q. In the night time it will display a green light?

A. Yes, sir.

Q. And that means for the engineer to proceed with his train?

A. Yes, sir.

Q. Now, you say that the next block west of the distance signal is about a mile from the distance signal, or a mile from 426?

A. A mile from 426.

Q. It would be about three-quarters, then, from the distance signals?

A. Just about, I guess.

Q. And where is the next block signal west of that one?

A. It would be about ninety cars.

Q. Where with reference to the west end of the switch at Herdon?

A. Right at the west switch.

Q. And about how far would that be in rods or miles?

A. Oh, I don't know. It must be over a half a mile.

Q. Half a mile to three-quarters, would it be?

A. Yes, sir.

Q. And what is the next signal west of the West Herdon home signal?

A. A distance signal.

Q. And how far is that west of the West Herdon home signal, the distance signal?

A. About sixty car-lengths.

Q. About a quarter of a mile?

A. Between a quarter and a half a mile.

Q. Now, what signal is west of that signal?

A. A stop signal or home block signal.

138 Q. When Conductor Phillips came up to the engine at Dix, what was his condition with reference to being covered with ice and snow?

A. Why, I don't know. He was down on the ground and I didn't get an opportunity to see him.

Q. What was the condition of his face and eyes with reference to snow and frost?

A. I never got to see them either.

Q. You gave your deposition up in Cheyenne, did you not, in this case?

A. Yes, sir.

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Q. You testified there before Mr. Wilcox, a notary public?

A. Yes, sir.

Q. Now, to refresh your recollection, let me ask you if at the time that deposition was taken you were not asked the question—you were testifying with reference to when he was at the engine at Dix, and you were asked this question: "What was the condition of Conductor Phillips with reference to snow and ice when he came up to the engine?" And did you not answer, "Why, he was covered with snow from the snowing; he was pretty well wrapped up, though."?

(Objected to as incompetent, irrelevant, immaterial, not a proper manner in which to refresh the recollection of the witness, and an attempt on the part of counsel to impeach his own witness. Overruled. Exception.)

A. I could see his form down on the ground.

Q. Well, I am asking you if the question was not asked you up at Cheyenne when you gave your deposition, and if you didn't make that answer to it.

139 (Same objection as to the preceding question. Overruled. Exception.)

A. Yes, sir.

Q. It was asked you?

A. Yes, sir.

Q. And you made that answer?

A. Yes, sir.

Q. I will ask you if it is not a fact that at that same time, when you were giving that deposition, this question was not asked you: "State what was the condition of his face and eyes with reference to snow and frost." And you answered, "It was like a coat of frost, kind of hanging on his face and eye-lashes."

(Objected to as incompetent, irrelevant, immaterial, and an attempt to impeach his own witness. Sustained. Exception.)

Q. How many times did you attempt to see the block signals after you left Dix?

A. Not very often; only coming into stations was all.

Q. How many did you see after you left Dix?

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any issues in this case, and too indefinite, for the reason that the witness has stated that he did not make any attempt to see them. Sustained. Exception.)

Q. What was the condition of the storm that night at the time you got to Mile Post 426?

A. About the same as it would be at Dix or Potter.

Q. Was it blowing hard?

A. Yes, sir.

140 Q. And snowing hard?

A. The snow that had fallen was blowing hard. I don't know whether it was snowing much or not; you couldn't tell.

Q. There was a great deal of snow in the air?

A. Yes, sir.

Q. State whether or not there was more or less snow blowing when you got to Mile Post 426 than there was blowing farther west.

A. It was blowing about the same. It looked general to me.

Q. Where was the engineer with reference to the station at 426 when he whistled for orders?

A. Just about under the board. I don't know whether he was just right under it or not, because I was down under the deck and I couldn't tell; but I think he was just about to approach under the board.

(Defendant moves to strike out the answer as incompetent. Sustained. Exception.)

Q. Do you remember whether he whistled for orders at 426?

A. Yes, sir.

Q. Where were you?

A. I was right on the engine.

Q. Whereabouts on the engine were you?

A. Just after getting done putting in a fire.

Q. Did you look out at that time when he whistled?

A. No, sir.

Q. Did you look to see where your location was?

A. I knew where we were.

Q. How did you know it?

A. I knew that we were approaching Mile Post 426.

Q. But did you know where you were with reference to Mile Post 426?

141 A. Yes, sir.

Q. How did you know it?

A. By crossing over the big bridge just west of it.

Q. Now, in order to refresh your recollection, I will ask you if you did not testify, in this deposition that you gave in Cheyenne, with reference to this; the question was asked you, "How far from Mile Post 426 when he whistled?"—referring to the engineer—and the answer, "He was about in front of the door of the office when he whistled."?

(Mr. Ellick: Objected to as incompetent, irrelevant, immaterial, and an attempt to impeach his own witness, and for the further reason that he is displaying before the jury here a transcript of evidence which he claims is something that the evidence does not show it to be.)

Mr. Halligan: Now I want to object to that statement.

Mr. Ellick: I say he is representing that statement to be something that the evidence does not show it to be, and for that reason I object to this method of examining his own witness as being improper.

Mr. Halligan: This witness has now testified that he doesn't remember these things. He is my witness. I put him on here from necessity. I have a right to refresh my own witness's recollection if I can. It might be that he remembered at one time and does not

remember at this time. I have a right to ask him anything that will help him remember the facts that I am trying to elicit from him.

By the Court: The Court's ruling striking out the answer (Page 188: "Just about under the board. I don't know whether he
142 was just right under it or not, because I was down under the deck and I couldn't tell; but I think he was just about to approach under the board.") is withdrawn, and the motion to strike is overruled.

To which the defendant excepts.)

Q. Did you call the engineer's attention to the fact that you had crossed that bridge just west of Mile Post 426?

A. Yes, sir.

Q. What did the engineer do then with reference to slowing down the train?

A. He was slowing down all the time, before he went across this bridge, with the intention of coming to it.

Q. Did you stay with your engine there at 426 all the time?

A. Yes, sir.

Q. Did you see the fire up at the other end of the train?

A. No, sir.

Q. Why couldn't you see it?

A. Because it was storming a little, and another thing I wasn't looking for it very much.

Q. Storming a little, did you say?

A. I said it was storming, and another thing, I didn't look for it.

Q. Is that the reason you didn't see it?

A. Yes, sir.

Q. Why didn't you look for it?

A. Why, because it wouldn't benefit me any by doing it.

Q. Why not. Couldn't you have seen it?

A. I was at least forty cars away from it.

143 Q. Do you mean to say that you couldn't have seen it if you had looked for it?

(Objected to as leading and suggestive. Sustained. Exception.)

Q. You heard about the wreck, didn't you?

A. Yes, sir.

Q. Did you hear the cars were on fire?

A. Yes, sir.

Q. But you didn't look at it?

A. I looked back towards the office. I didn't know whether there was a big fire back there or a little fire.

Q. After you heard the cars were on fire, did you look back to see?

A. I looked back towards the office, yes, sir.

Q. Did you look in the direction towards the cars, where the fire was?

A. Yes.

Q. Did you see the fire?

A. No, the office was between me and where the fire was.

Q. That was the reason, was it?

A. That helped it.

Q. What else obstructed it?

A. The storm. That is what I answered before.

Q. Have you been talking to these gentlemen on the other side with reference to the testimony here?

(Mr. Ellick: I object to the question as insulting to the witness. Sustained. Exception.)

Mr. Rich: The attorney knows that the witness has talked it over with us, as all the witnesses have.

144 Mr. Halligan: I know he hasn't talked it over with us, and that he wouldn't.

Mr. Ellick: I except to the statement of counsel for the plaintiff, saying "I know that he hasn't talked it over with us, and I know that he would not do it," as being prejudicial, and I request the court to instruct the jury not to consider the statement of counsel.

By the Court: Gentlemen of the Jury, you will not consider any statements made by counsel on either side that are by-statements, such as they have made or may hereafter make in the progress of the trial.

Q. How far was your engine from the engine that was pulling 510 when you stopped?

A. They were about two or three cars east of us, on the west-bound track.

Q. Could you see what they were doing over at that engine?

A. They were not doing anything that I know of.

Q. Could you see them when they were clearing up at the switch?

A. No, sir.

Q. You didn't see them out there?

A. No, sir.

Q. You didn't see them burning fusees?

A. No, sir, I didn't know they were burning them.

Q. About how far were you from the switch?

A. Probably seven or eight cars after pulling down.

Q. Well, before you cut off and pulled down, how far were you from the switch?

A. Three or four cars.

145 Q. Now, at the time you stopped your engine there at Mile Post 426, were you on the double track or the single track?

A. We were headed in on the double track.

Q. Headed in on the double track and past the switch?

A. Yes, sir.

Q. Did you see 410 when she backed down on to your train?

A. Yes, sir.

Q. What did they do after they backed down on to your train?

A. They coupled on to it.

Q. And then what did they do?

A. They were going to charge up the train with her, and found

out that the air-line was broken; and when he found that he blows the whistle that they are broken in two.

Q. And then what was done?

A. Then the brakeman proceeded along the train to find out where it was.

Q. How did he discover that the air-line was broken? What was it that indicated to the engineer of 510 that the air-line was broken?

A. The air-guage on his engine.

Q. What did you say was the condition of the air-guage?

A. There was no air pressure and he couldn't pump it up.

Q. And therefore he knew that the air-line was broken some place?

A. The air-line was either broken or there was one of the angle cocks was open, or something was wrong.

Q. Now tell the jury what an angle cock is.

A. There is an angle cock on the end of each car, to cut off or to open up to let air go through. It is a kind of a cut-out cock.

Q. It is a cut-off valve, is it?

A. Yes, sir.

146 Q. Where if you set it in one direction the air cannot pass beyond that valve?

A. No, sir.

Q. How long was it after the engine on 510 whistled that the air was broken before you learned that there had been a collision?

A. Well, I don't know just how long the time was, but it was from the time that the brakeman on the other train walked down to the office and notified them. I don't remember just how long it was.

Q. How far west of the home signal governing eastbound trains at the west end of Herdon sidetrack is it to the next home signal west?

A. Governing eastbound?

Q. Governing eastbound.

A. I should judge about a mile and a half. It is at the Point of Rocks.

Cross-examination by Mr. Ellick:

Q. You say you put a lantern in your headlight at Dix?

A. Yes, sir.

Q. That is in accordance with the requirements of the rules of the company when the headlight goes out?

(Objected to as immaterial. Overruled. Exception.)

A. Yes, sir.

Q. And that lantern sits in there with the reflector of the headlight behind it?

A. Yes, sir.

147 Q. While you were at Dix waiting for this train that was to meet you at that point, the passenger or mail train, Mr. Phillips you say came up to the engine?

A. Yes, sir.

Q. When did you get off of your engine with reference to the time

that Phillips first came up to your engine for the purpose of fixing the headlight?

A. Before he came up.

Q. Then you went back on your engine, did you, and remained there throughout the entire time that you remained at Dix?

A. Yes, sir.

Q. And during that time were you busying yourself about the affairs of that engine?

A. I was looking about the engine and seeing that it was all right.

Q. Your work required you to be busy during that time while you were on your engine?

A. It required me to pay attention to my engine.

Q. And you were not paying any attention to anything that was going on off of your engine during that time?

A. No, sir.

Q. So you don't know who might have been out in front of your engine or out around the engine 501?

A. No, sir.

Q. You say that the orders when received are read by the engineer and then delivered to the fireman to be read, and then handed back to the engineer?

A. Yes, sir.

Q. Is that done for additional security in the operation of the train?

148 (Objected to as immaterial and not proper cross-examination. Overruled. Exception.)

A. Yes, sir, it is.

Q. Now, you say when your engineer stopped the train at Mile Post 426 that he whistled out a flag?

A. Yes, sir.

Q. What do you mean by that?

A. He whistled one long and three short.

Q. He gives one long whistle and three short whistles?

A. Yes, sir.

Q. And that is a warning to the rear brakeman that he must get out and flag his train?

A. Yes, sir.

Q. And is that the manner in which Zalesky, your engineer, whistled out the warning to the rear brakeman when he stopped at Mile Post 426?

A. Yes, sir.

Q. And is that in accordance with an established rule of the company?

A. Yes, sir.

Q. Now, you said that on that night the snow was blowing considerably. What is the fact with reference to the track between the east switch at Herdon and Mile Post 426, as to whether snow accumulates on the track there when the wind is blowing?

A. There is not any snow accumulates on the track there on account of it being up on a grade.

Q. That is due to the fact that the track there is raised higher than the surrounding country, and the wind blows the snow off of the track and keeps it clear?

A. Yes, sir.

149 Q. And that was the condition of that track on the night of this wreck?

A. Yes, sir.

Q. And that was the condition of this track at the point where this wreck occurred?

A. Yes, sir.

Q. After stopping the first time at Mile Post 426, you say in about ten minutes your engine with some cars was uncoupled from the balance of your train and you then moved east on to the double track?

A. Yes, sir.

Q. How far east did your engine move?

A. Why, I should judge it would have to move about four car-lengths in order to clear that track to let the other engine get back on our train.

Q. So that would make your engine four car-lengths farther east from the mile post at the time you made your last stop than it was at the time you made your first stop?

A. Yes, sir.

Q. You were observing the operations of engine 510 when they moved down on to the switch for the purpose of coupling on to the balance of your train, were you?

A. Yes, sir.

Q. And you saw that engine at that time?

A. I saw that engine passing us on the other track, going back to get on our train.

Q. I understood you to say in your direct examination—I don't know whether I am correct or not—that there is a distance signal for trains proceeding eastward between the home block signal eighty feet west of Mile Post 426 and the home block signal at the
150 east end of the Herdon switch. Did you wish to be understood as saying that, or are you sure about that?

A. I was not positive about that one there, but I thought there was one there. I know there was one there governing the west-bound.

(Defendant's Exhibit One is identified.)

Q. I call your attention to the plat here marked by the reporter Defendant's Exhibit One, and ask you to examine that plat with reference to the different improvements along the right of way between Herdon or Point of Rocks and Mile Post 426, and tell us if after looking at that map your recollection is refreshed with reference to the fact as to whether there is a distance signal for trains eastward between the home block at the east switch at Herdon and the home block eighty feet west of Mile Post 426.

(Objected to as incompetent, irrelevant, immaterial, and no foundation laid. Overruled. Exception.)

A. I don't believe now there was one there, but I believe the east block at Herdon governed the same as the home block signal west of Mile Post 426 when the switch was against us.

Redirect by Mr. Halligan:

Q. You mean to be understood now to testify that there was no distance signal a quarter of a mile west of Mile Post 426?

A. Yes, sir.

Q. You testified in your direct examination that there was, did you not?

A. Well, I got a westbound one mixed, I guess. There is one there, but it controls westbound.

151 Q. What has refreshed your recollection in that particular?

(Objected to as incompetent, irrelevant, immaterial, and an attempt to cross-examine his own witness, and because the jury has seen what he refreshed his memory with. Sustained. Exception.)

Q. Do you know anything about whether that map is correct or not?

(Same objection as to preceding question. Sustained. Exception.)

(Witness excused.)

U. A. BUCKINGHAM, called as a witness on behalf of the plaintiff, and duly sworn, testified as follows:

Direct examination by Mr. Halligan:

Q. Where do you reside?

A. Cheyenne.

Q. What is your occupation?

A. Conductor on the Union Pacific.

Q. And between what cities do you run?

A. Cheyenne and Sidney.

Q. Cheyenne, Wyoming, and Sidney, Nebraska?

A. Yes, sir.

Q. Are you in the employ of the company now?

A. Yes, sir.

Q. Were you in the employ of the company on the 13th day of March?

A. Yes, sir.

152 Q. Did you take a train out of Cheyenne, Wyoming, for Sidney, Nebraska, on that day?

A. Yes, sir.

Q. What train did you take?

A. Extra freight 501.

Q. Do you know what train that followed?

A. No, sir.

Q. Did you know what train was ahead of you?

A. Not leaving Cheyenne, no, sir.

Q. Did you know what train you overtook at Dix?

A. Yes, sir.

Q. What train was it?

A. Extra 504 east.

Q. How far did you proceed with that train 501?

A. To Potter.

Q. And why did you not proceed with your train when it left Potter?

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any issues in this case or any act of negligence charged in the petition against the company. Overruled. Exception.)

A. I was taking orders in the depot and the train pulled out and left me. I supposed it was taking the sidetrack while I was in there.

Q. When you came out where was the train?

(Same objection as to preceding question. Overruled. Exception.)

A. It had left.

Q. Who was your engineer that night?

A. Mr. Cameron.

153 Q. What orders had you given, if any, for the train to proceed?

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any issues in this case or any act of negligence charged in the petition against the company. Overruled. Exception.)

A. At Potter?

Q. Yes, sir.

(Same objection as to preceding question. Overruled. Exception.)

A. None.

Q. Who gives the orders to the engineer to pull out of a station?

A. The operator or the conductor.

(Witness excused.)

L. E. MCGINNIS, called as a witness on behalf of the plaintiff, and duly sworn, testified as follows:

Direct examination by Mr. Halligan:

Q. Where do you reside, Mr. McGinnis?

A. Cheyenne, Wyoming.

Q. What is your occupation?

A. That of a brakeman on the Union Pacific railroad.

Q. How long have you been engaged in that business?

A. About three years.

154 Q. Between what points were you running on the 13th and 14th of March last?

A. Between Cheyenne and Sidney.

Q. Did you go out on a train from Cheyenne on the 13th day of March, 1913, that is, last March?

- A. I did.
- Q. What train was it that you went with?
- A. Extra 501 eastbound.
- Q. And in what capacity did you go?
- A. As head brakeman.
- Q. Who was the engineer of that train?
- A. Engineer Cameron.
- Q. And who was the fireman?
- A. Fireman Long.
- Q. And who was the conductor?
- A. Conductor Buckingham.
- Q. And who was the rear brakeman?
- A. Mr. Fred Brendel.
- Q. About what time on the 13th of March did you leave Cheyenne?
- A. About 7:15 or a little later.
- Q. What kind of a train was your train, passenger or freight?
- A. A freight train.
- Q. What kind of freight were you hauling at that time?
- A. Principally dead freight, and two cars of stock; of elk.
- Q. Two cars of elk?
- A. Yes, sir.
- Q. What do you call dead freight?
- A. Well, it varies. Lumber and coal and things like that.
- Q. What point did you leave and to what point were you going?
- A. We left Cheyenne, Wyoming; destination supposed to be Sidney, Nebraska.
- 155 Q. What was the condition of the weather when you left Cheyenne?
- A. Snowing a little.
- Q. How was the wind?
- A. About a thirty mile an hour wind, I should judge, at Cheyenne.
- Q. Where did you make your first stop?
- A. I think Archer.
- Q. And where did you stop next?
- A. Egbert.
- Q. Did you stop at Pine Bluffs?
- A. We did.
- Q. How long did you stop there?
- A. About forty minutes or such a matter.
- Q. How was the weather at Pine Bluffs?
- A. Still snowing and the wind blowing.
- Q. How was it as compared with when you left Cheyenne?
- A. A little worse.
- Q. And where was the next stop that you made after you left Pine Bluffs?
- A. Kimball, Nebraska.
- Q. How long did you stop there?
- A. Well, somewhere near the same length of time.
- Q. And what was the condition of the weather at Kimball?

A. Well, there was increase in the velocity of the wind and more snow in the air.

Q. And where was the next stop you made after you left Kimball?

A. Dix.

Q. Did you overtake any freight train on that trip, that run, at any point between Cheyenne and Dix, do you know?

A. No.

Q. Did you overtake a freight train at Dix?

A. We did.

156 Q. What train did you overtake at Dix?

A. Extra 504 eastbound.

Q. When you came to the station at Dix, what track were you on?

A. Eastbound main line.

Q. The track there is a double track, is it?

A. It was at that time and is at present, yes, sir.

Q. At that time it was a double track west of Dix?

A. To Kimball.

Q. And a single track east of Dix to Mile Post 426?

A. It was.

Q. Now, did the headlight of your engine go out that night?

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any issues in this case or any act of negligence charged by the petition. Overruled. Exception.)

A. It did.

Q. At what point did it go out?

(Same objection as to preceding question. Overruled. Exception.)

A. Somewhere before we arrived at Kimball.

Q. What kind of a headlight did you have in your engine, that is, when you left Cheyenne?

(Same objection as to preceding question. Overruled. Exception.)

A. One of these freight carbide headlights, or the same effect as that.

Q. What they call an acetylene headlight?

A. Acetylene headlight; that is it.

Q. What was done to the headlight at Kimball?

A. A white lantern placed in the headlight at Kimball, or thereabouts, I believe.

157 Q. Where were you riding that night on your train?

A. On the engine.

Q. And when you stopped the train at Dix, where was your engine with reference to the station?

A. Oh, it was six or eight car-lengths to the west, or maybe better than that. I couldn't say exactly.

Q. And did you see the engine of 504 there that night?

A. I did.

Q. About what distance was that from your engine?

A. Their pilot was a little to the rear of the tender of our engine.

Q. And about what is the distance between the sidetrack on which

504 was standing and the main track on which your train 501 was standing?

A. Why, I think it is about eight feet clearance between the two tracks.

Q. How long was it after you arrived at Dix before the passenger train came from the east, about?

A. About four minutes, I believe, in my judgment.

Q. Do you remember where you were at the time that passenger train went through?

A. I was in the engine, engine 501.

Q. Had you been to the station after you came into Dix and before the passenger train went through?

A. I had not.

Q. You had not gone to the station at that time?

A. I believe not.

Q. Now, from the time that you arrived in Dix that night up to the time the passenger train went through, who was with you there in your engine?

158 A. Up to the time the passenger went through?

Q. Yes.

A. I believe none but the crew that was on our engine.

Q. You don't remember whether there was anyone else there or not?

A. No.

Q. How long were you in the station after that passenger train went through?

A. Oh, between ten and fifteen minutes, I should say.

Q. And when you came out, was 504 Eastbound still there?

A. She was.

Q. How soon after you came out was it before she left?

A. They were endeavoring to leave as I came back to my train.

Q. Do you mean that they were cleaning out the switch, or had they started the engine?

A. The engine had been started.

Q. Were you out there around either your engine or the engine of 504 when they were cleaning out the switch?

A. I wasn't around engine 504.

Q. Did you go up to engine 504 that night at Dix?

A. I did not.

Q. I think you said as you came out they were attempting to pull out. I will ask you how soon they did pull out after you came out.

A. Well, I should judge it was a matter of somewhere around eight to ten minutes in getting out there on the main line.

Q. What I mean is, how soon after you came out was it when they started the engine down to get on to the main line?

A. I believe I said when I came out the engine was started.

Q. And it didn't stop any more that you remember?

A. I believe their engine did stop.

159 Q. Whereabouts?

A. Somewhere with the pilot along about the cab of our engine or close there.

Q. And how long did they stop there?

A. Long enough for us to back up our engine to clear the main line where it overlapped the cross-over.

Q. Your engine had gone so far, had it, that they couldn't get on to the main line without you backing up?

A. That's the idea.

Q. And you had to back up a little, and then they pulled on and went right on out?

A. Yes, sir.

Q. Did you see Conductor Phillips there that night?

A. I did.

Q. Where did you see him?

A. Somewhere around our engine.

Q. Was that before you went into the station?

A. I believe he climbed on the engine as I was leaving the engine to go to the station.

Q. Did you see him when you came out from the station?

A. I believe I met him somewhere about the pilot of our engine.

Q. Who was with him, if anyone, when he was climbing on to the pilot of your engine?

A. I didn't say that he climbed on the pilot of our engine.

Q. You said he climbed on your engine?

A. Yes.

Q. Who was with him then?

A. To my knowledge no one.

Q. Did you see anyone with him?

A. Not that I remember.

160 Q. And who of his train crew was with him when you came out of the station, when you say you saw him about the pilot of your engine?

A. Brakeman McManus.

Q. Was Brakeman Cradit there with him?

A. Not to my knowledge.

Q. Did you see Brakeman Cradit up there at the front end of that train that night?

A. I don't recollect of seeing Brakeman Cradit at the front end of that train.

Q. What was the condition of the storm there that night at Dix?

A. About the same as it was at Kimball; maybe a little stronger.

Q. How far could you see out into the storm that night?

A. Well, there is a difference in looking into a storm whether you are looking against something or into vacancy.

Q. Well, where there wasn't anything except the snow; for instance, how far could you see ahead of an engine that night?

A. I couldn't see the head of an engine.

Q. Could you see the head of the engine from the cab?

A. I couldn't see the head of the engine from the cab.

Q. Did you look out to see if you could?

A. I looked out of the cab several times.

Q. About where was it when you looked out of the cab?

A. From Pine Bluffs to Mile Post 426.

Q. Did you look out of the cab after you left Kimball?

A. I did.

Q. Did you look out of the cab after you left Dix?

A. I did.

Q. About how far could you see a lantern that night, in your judgment, in that storm?

A. Varying from eight to ten feet.

161 Q. How long did you remain there after 504 pulled out before you started?

A. About thirty-five minutes.

Q. That was at Dix, was it?

A. That was the question asked.

Q. And where did you stop next after you left Dix?

A. At Potter, Nebraska.

Q. Was train 504 at Potter when you got there?

A. Not to my knowledge.

Q. You didn't see it there?

A. I did not.

Q. Did you take orders at Potter from the dispatcher?

A. I did.

Q. How did you take the orders there at Potter?

A. On the order pad provided for such purposes.

Q. How did they come, over the telephone or telegraph?

A. Over the telephone.

Q. And who telephoned the dispatcher?

A. I did.

Q. Now, what orders did you get there from the dispatcher with reference to your train?

A. I have forgot the order number, but the order read: "Extra 501 meet Extra 510 West on double track between Mile Post 426 and Sidney instead of at Potter."

Q. Did you have any talk with the dispatcher there with reference to the engine on 510 West?

A. I believe there was.

Q. What was that conversation?

A. That Engine Extra 504 was at Mile Post 426 picking up engine 510 Westbound, or would be.

162 Q. Or would be?

A. They were there, I believe.

Q. Did the dispatcher say what was the matter with engine 510 that you remember?

A. Not that I remember, no.

Q. Now, I will ask you if you communicated those orders to your engineer.

A. I did.

Q. How long after you received those orders was it before your train left Potter?

A. I believe our train had left the water tank when I came from the office and climbed on the engine.

Q. And did you then start out?

A. We proceeded.

Q. Now, after you left Potter, and going down to Mile Post 426, what was the condition of the weather?

A. Still snowing and blowing, or blowing snow; I don't know which.

Q. Did you look out of the engine after you left Potter before you got to Mile Post 426?

A. I stood in the gangway.

Q. And how far could you see?

A. No farther than before.

Q. Could you see the head of your engine?

A. No, sir.

Q. I will ask you how many block signals you saw between Potter and Mile Post 426, or where the wreck occurred.

A. None.

Q. Were you looking for them?

A. As I said, I stood in the gangway.

163 Q. Weil, were you trying to see the signals as you went along and locate yourself?

A. Yes.

Q. About how far is it from Potter to the point where this accident occurred?

A. Six to seven miles, I should judge.

Q. Do you remember how long you were in running that distance?

A. Somewhere in the neighborhood of twenty-five minutes or better.

Q. Now, I will ask you what occurred down there about a mile or half a mile west of 426; what occurred to your train and train 504?

A. Engine 501 collided with the rear end of Extra 504.

Q. Where were you when the collision occurred?

A. Standing on the platform immediately to the left hand of the engineer.

Q. And where was the engineer?

A. Looking out the window, seated on the seat box.

Q. The front window or the side window?

A. The side window, I believe, at that time.

Q. And what occurred when you struck the train, when your engine struck the caboose, what next happened?

A. A jarring and jolting of our engine and the raising of the deck a slight distance of six or seven inches, and a short conversation between the engineer and myself.

Q. What did the engineer say when you struck 504?

(Objected to as incompetent, irrelevant, immaterial, and hearsay. Sustained. Exception.)

Q. What did you first observe with reference to the caboose on 504?

164 A. The steps, presumably of the rear platform, immediately opposite the gangway of our engine when upon the ground.

Q. Who did you see immediately afterwards, other than the members of your own crew?

A. A member of the stockmen in the caboose on Extra 504.

Q. And where was the first one of the men in 504 that you saw after the collision?

A. About midway between the gangway and the pilot of our engine.

Q. And whereabouts?

A. Close to the side of our engine.

Q. On the ground?

A. On the ground.

Q. And was he standing or lying down?

A. Endeavoring to stand.

Q. When did you next see another of the occupants of the caboose on 504?

A. A few minutes later.

Q. Where was he?

A. Somewhere near the smokestack on our engine, or on the run-board, I couldn't say which, but in that vicinity.

Q. And on which side of your engine was it?

A. About the center of it, on top.

Q. I mean, was he on the north side? You said possibly on the running board.

A. Well, it would be on the south side if he was on the running board, but I think he was near the center of the smoke box.

Q. State what his condition was with reference to standing, or how he was.

A. I believe he got over in front of the smoke box and walked along the run-board, or something to that effect.

165 Q. Did you see him when he came into the cab?

A. I don't remember whether I was in the cab when he came in or not.

Q. What did you do after that?

A. I walked to the front end of the engine.

Q. Did you see any other person who was riding in the caboose of 504 at the time of the collision, except the two men you have just described?

A. I saw portions of them.

Q. Did you see any more of them at that time, at the time of the collision?

A. Any more members of the crew?

Q. Or passengers, or anybody else around there?

A. I saw some bodies in the wreckage.

Q. You could see them there could you?

A. Not all of them.

Q. Did you see some of them?

A. I did.

Q. And could you identify any of them there that you saw?

A. Not at that time.

Q. How were you able to see them?

A. By the light caused from the burning of the wreckage.

Q. Now, what occurred to the wreckage immediately after the collision?

A. It became on fire.

Q. And was that the way that you were enabled to see these bodies in there?

A. It was.

Q. How many bodies did you see in the caboose?

A. I distinctly remember of only one.

166 Q. And where was that with reference to your engine?

A. A little to one side like; that is, lying considerably over the side in front of the smoke box.

Q. Now, then, Mr. McGinnis, where was the pilot of your engine with reference to the east platform of the caboose on 504 after the collision; that is, how close did your pilot plow through and get to the front platform of the caboose?

A. Well, I can't say. It must have gone nearly through the caboose, however.

Q. Where was the rear platform of the caboose with reference to the cab?

A. I didn't see the rear platform.

Q. I understood you to say that the rear platform of the caboose was in a certain location with reference to your engine.

A. I said the steps of the caboose, presumably of the rear platform.

Q. You saw some steps there, did you?

A. I did.

Q. And where were the steps?

A. About directly opposite the gangway of our engine.

Q. On the ground?

A. On the ground.

Q. State what was done there, Mr. McGinnis, with reference to getting any of the persons who were in the caboose prior to the collision out?

(Objected to as immaterial. Overruled. Exception.)

A. We looked the situation over and decided that we were not equal to raising the trucks and releasing the bodies.

Q. And the caboose was on fire at that time, too, was it?

A. It was.

167 Q. How many of you men were there at that time who were able to lend a hand to get those people out?

A. Three.

Q. Just the men of your engine crew and yourself?

A. Yes, sir.

Q. What did you do after that?

A. I went to Mile Post 426.

Q. I will ask you at the time that you saw this body in the caboose, as you say, what evidence of life did it exhibit, if any?

A. None to my knowledge.

Q. About how soon after the collision was it before the car blazed up in fire, or that the fire started in the wreckage?

A. It must have started immediately.

Q. And how fast did the flames proceed? That is, how soon was it until the wreckage was enveloped in flames?

A. I can't state. I wasn't there long enough.

Q. You didn't stay there?

A. Not until the whole wreckage was in flames.

Q. At the time you left, how far had the flames proceeded in the caboose? Had they broken on the outside?

A. Well, the caboose was broken inside out.

Q. But had the flames got to the outside of the caboose so as to be free and open in the air?

A. They started in the open.

Q. Now, at the time of the collision was this caboose just smashed out of all semblance to a car?

A. Yes, sir.

Q. Just doubled right up, was it?

A. Principally, I suppose. There wasn't much of it to be seen at that time.

168 Q. About how long after the collision was it before you started to Mile Post 426?

A. Eight to ten minutes.

Q. What did you do after arriving at Mile Post 426?

A. I went inside of the temporary office.

Q. And how long did you remain there?

A. A matter of twenty or twenty-five minutes, I should judge.

Q. Did you report the collision to the dispatcher?

A. I told the operator to report it.

Q. Could you see the fire at the caboose from the station at 426?

A. I could not.

Q. Why? What was the reason it could not be seen that distance?

A. The storm.

Q. After you left the station at Mile Post 426, where did you do?

A. Back to our engine, engine 501.

Q. Who was there when you got back there to the engine?

A. Engineer Cameron and two stockmen.

Q. Was Fireman Long there?

A. No, sir.

Q. And what was the condition of the wreckage after you got back there?

A. Pretty well enveloped in flame, that is, burning.

Q. How many cars had been mashed or broken beside the caboose?

A. Two, I believe.

Q. And how long did the wreckage continue to burn?

A. I can't say, as I went back to the rear end of see whether Brake-man Brendel was out flagging.

Q. And how long did you stay at the rear end?

A. I didn't take note of the exact length of time.

Q. And where did you go from there?

A. Back to our engine.

169 Q. And who was there when you returned that time?

A. I believe Fireman Long and Engineer Cameron and the two stockmen, if I remember correctly.

Q. Where were they staying during this time?

A. In the cab.

Q. Had they backed the engine away from the wreckage, your engine 501?

A. No, sir.

Q. Did the fire burn the engine any?

A. It did.

Q. The front end?

A. The pilot; the wood.

Q. Now, at the time you returned to your engine that time from the rear end of your train, what time was it with reference to daylight? Was day breaking?

A. It was becoming a little lighter.

Q. And how long did you remain at your engine at that time?

A. Oh, I should judge about fifteen minutes.

Q. And then where did you go?

A. To Mile Post 426.

Q. And what did you do when you arrived there?

A. I had a little conversation with the parties at Mile Post 426.

Q. Did you go into Sidney with that part of train 504 that they brought in?

A. I did not.

Q. How long did you stay around Mile Post 426 and your train?

A. Until Saturday afternoon along about three o'clock, I believe it was.

Q. What day of the week was this wreck?

A. I believe it was on Friday morning.

170 Q. And you staid there until Saturday afternoon?

A. Yes.

Q. Was that the first time you had an opportunity to get away?
(Objected to as immaterial. Sustained. Exception.)

Q. How long did the storm continue?

A. Until some time Friday night, I believe.

Q. It continued all the next day?

A. It did.

Q. And until some time the next night?

A. Yes, sir.

Q. Could you see the block signals when you left Cheyenne, Mr. McGinnis?

A. We could.

Q. And how far on the trip could you see block signals?

A. Somewhere around Oliver.

Q. Is that in Nebraska or Wyoming?

A. That is in Nebraska.

Q. What way from Kimball?

A. West.

Q. I will ask you, Mr. McGinnis, if it was freezing that night.

A. I believe the thermometer was below freezing point, yes, sir.

Q. About how far, in your judgment, did your train run after it collided with the caboose of 504?

A. About a matter of two or three car-lengths, I presume, or such a matter.

Q. Mr. McGinnis, prior to the collision, what warning was given by the engineer of the collision, if any?

(Objected to as unintelligible. Sustained. Exception.)

Q. Well, what warning, if any was given of the approach to train 504?

171 A. Why, I think that at the point we deemed ourselves at, it was not necessary to give any warning.

Q. When did you first know that you were near train 504?

A. After we had hit them.

Q. How many cars burned there?

A. The caboose and a portion of another one, I believe.

Q. Were you there when the bodies were taken out?

A. I was at the rear end of our train when the bodies were taken out.

Q. Did you see the bodies after they were taken out?

A. I did not.

Q. Who came up there and took out the bodies from the wreck?

A. The wrecking crew, consisting of men I don't know.

Q. Now, at the time you had the conversation with the dispatcher over the telephone from Potter, Nebraska, did you report to him the condition of the weather?

A. I believe I said something about a heavy storm going on, or something to that effect; a bad storm.

Q. And what did he say with reference to that?

A. I don't believe there was any direct answer.

Q. Did you tell him the difficulty you were having with reference to seeing the signals?

A. I did not.

Q. What was it that you told him? Just that there was a heavy storm?

A. A heavy storm, I believe.

172 Cross-examination by Mr. Ellick:

Q. You gave your deposition to the plaintiff in this case at Cheyenne, did you?

(Objected to as immaterial. Overruled. Exception.)

A. I did.

Q. And do you remember this question being asked you, and in reply thereto making this answer: "In your conversation over the telephone with Mr. Borden, did you say anything to him about the condition of the weather at Potter at that time?" To which question you answered: "I don't think that there was any conversation in regard to the weather, as I remember now, any more than I believe I told him to hurry up, that I was wet and would like to get back on the engine."?

A. I believe I made that statement.

Q. You said that your engine that night was equipped with an ordinary freight headlight. By that do you mean that it had a light that is ordinarily used by freight trains in this community?

A. That is what I meant.

Q. And on railroads generally?

A. Yes, sir.

Q. Now, when you got the order, Mr. McGinnis, at Potter, that was over the telephone, was it?

A. It was.

Q. That is not a telegraph station?

A. It is a telegraph station, but not at night.

Q. And you received your orders at that station from the dispatcher over the telephone?

A. I did.

173 Q. You say that the dispatcher told you at Potter that
426? Extra 504 East would pick up the engine of 510 at Mile Post

A. I made that statement, or that they were now picking it up.

Q. You don't remember which he said?

A. No.

Q. And told you to proceed down there with great caution?

A. He did.

Q. Now, did you report all of that statement to Mr. Cameron?

A. I reported that portion of the statement to Mr. Cameron, I believe.

Q. Which portion?

A. That Extra 504 was at Mile Post 426, or would be, picking up engine 510.

Q. And to proceed down there with great caution, did you also report that?

A. I couldn't say.

Q. Now, are you sure that you reported that statement of the dispatcher to Mr. Cameron with reference to 504 picking up 510? Are you positive about that or not; or are you giving us simply your best recollection on that?

A. Best recollection.

Q. When you were proceeding from Potter or from Dix east, were you looking out for any fusees that might be on the track?

A. From where?

Q. From Dix east.

A. Why, I was looking out the window. I don't know whether I was looking in particular for fusees. I was trying to keep our position.

Q. Had any conversation that had been had between Mr. Phillips and Mr. Credit and Mr. Cameron been reported to you, with reference to the manner in which your train would be protected?

174 (Objected to as not proper cross-examination and calling
for hear-say. Overruled. Exception.)

A. Yes.

Q. And who reported that to you?

A. Engineer Cameron.

Q. And he told you that—— (Interrupted.)

(Objected to as hear-say. Sustained. Exception.)

Q. After that conversation, or after Mr. Cameron had reported to you the conversation which he had with Mr. Cradit and Mr. Phillips, did you keep a lookout for fuses along the track?

A. I was watching the track and the right of way from Dix up to the time of the collision.

Q. And were you listening for torpedoes, the explosion of torpedoes?

A. I can't say that I was exactly listening for them, but I might expect—a man's instinct when he is railroading leads him to expect such things.

Q. Could you have heard a torpedo that night if one had been exploded by your engine?

A. I can't say.

Q. How far can you hear a torpedo when it explodes?

A. It varies under conditions of the weather.

Q. Well, under favorable conditions for hearing it, how far on a still day with no wind?

A. Well, that is a hard proposition. A still day without any wind, and a straight track, perhaps a mile and a half, or a mile; maybe only a half a mile; but I should say a mile at the best.

Q. It makes a loud explosion, does it?

A. Like the report of a rifle.

175 Q. And ordinarily is plainly heard in the cab of the engine above the noise of the working of the engine?

A. It is.

Q. You didn't hear any torpedoes explode just before the collision?

A. I did not.

Q. And you didn't see any fuses on the track just before you reached the point of collision?

A. I did not.

Q. What is the fact with reference to the track between the east switch at Herdon and Mile Post 426 during snow storms when the wind is blowing? Does snow accumulate upon the track at that point?

A. Nothing more than what might lodge between the rails or against them.

Q. Because of the elevated condition of the tracks there, the wind clears the track of snow?

A. It does.

Q. And was that the condition of that track on the night of this wreck?

A. The track our train was on. The side of the train was clear except what snow had accumulated among the ties.

Q. How fast was your train going at the time of the collision?

A. Between five and eight miles per hour.

Q. And what was the condition of your train as to whether your air was working perfectly or not?

A. The air was in perfect condition.

Q. You say that the steps of this caboose appeared immediately after the wreck opposite the gangway between the engine and the tender; is that correct?

A. I believe so.

176 Q. The engine kind of split up the caboose and threw parts of it to the side of the track and then plowed through it?

A. It did.

Q. The cupola of the caboose was thrown clear over to one side of the track?

A. It was.

Q. But was not burned?

A. I believe not.

Q. Neither was that part of the wreckage that accumulated around the engines near the gangway?

A. No, sir.

Q. Now, you say that two cars ahead of the caboose were derailed?

A. I believe they were.

Q. And they were thrown over to the north of the track upon which your train was proceeding?

A. They were.

Q. Lying on their side?

A. They were.

Q. And were immediately north of a portion of the wreckage of the caboose?

A. They were.

Q. And were immediately north of that portion of the wreckage of the caboose which took fire?

A. They were.

Q. Where was the fire with reference to the cars of train 504 which remained standing?

A. About a distance of twenty feet to the west and a little bit to the right-hand side, where she started.

Q. And close to the ground?

A. Yes, it began close to the ground.

177 Q. Down low, next to the track?

A. Yes, sir.

Q. Now, from what direction was the wind that night?

A. North and a little west.

Q. What was the tendency of the snow and wind when it would strike your train on the side and pass over your train?

A. It whirled downward if it didn't come from underneath.

Q. So that the wind blowing over any object from the north had a tendency to blow the snow down on the south side of that object?

A. Yes, sir.

Q. That was a wet snow, that night, was it?

A. It was.

Q. Do you know about what the temperature was?

A. Somewhere around the zero point, or a little above.

Q. Don't you know that it was about 10 or 16 above at the time of the wreck?

A. Not to my positive knowledge from actually looking at a thermometer.

Q. Well, it might have been that for all you know?

A. It might have been.

Q. Now, when you got to Dix, Nebraska, you say you remained on your engine about four minutes before you got off?

A. Such a matter.

Q. And waited until the passenger train passed you?

A. There was one went by.

Q. And did that passenger train go by before you got off your engine?

A. I believe the rear end was going by at the time I got off of the engine.

178 Q. And you went then immediately to the station?

A. I said I did.

Q. And as you were going to the station you saw Mr. Phillips coming toward your engine?

A. I believe I met him in the gangway as I started out.

Q. Did you see from what direction he came?

A. Nothing more than he came up under the curtain.

Q. You were in the act of going out when you met him, and you went out?

A. I did.

Q. Did you look around there to see if there was anybody following Mr. Phillips?

A. I didn't look around, no, sir.

Q. There might have been somebody following and you not have seen them?

A. There might have been.

Q. And how long did you remain away from your engine?

A. I believe a matter of fifteen or twenty minutes; something like that.

Q. After the collision of your engine with the caboose of train Extra 504, you immediately got off of your engine?

A. I did.

Q. And staid around in the vicinity of that point for about eight minutes?

A. Eight to ten minutes, or such a matter.

Q. And then you walked the length of train 504 up to Mile Post 426?

A. I did.

Q. How long did you say you stopped at Mile Post 426?

A. Somewhere in the neighborhood of twenty or twenty-five minutes I was in the office, I should judge.

179 Q. You had been out in that storm considerable that night, had you not?

A. I had.

Q. And your clothes were wet?

A. They were.

Q. Were they wet through?

A. They were.

Q. After remaining in the depot at Mile Post 426, then you returned back to your engine?

A. I did.

Q. And walked back?

A. I did.

Q. How long did you say you stopped at your engine then?

A. Something like about fifteen minutes, I presume.

Q. Up on the engine all the time, or about the wreckage?

A. Part of the time in the engine and part of the time about the wreckage.

Q. And then you walked back in this storm the length of your train to your caboose?

A. I did.

Q. And how long did you remain then at the rear of your train?

A. I can't say exactly. I don't remember. I virtually undressed and changed clothes and dried some of them.

Q. In the caboose?

A. In the caboose.

Q. The caboose was dry and warm?

A. Well, it was dry in the front portion of it.

Q. And you changed your clothes in there?

A. A portion of them.

Q. Was Mr. Brendel there at that time?

A. He was not.

180 Q. Where was he, do you know?

A. He had left the caboose and gone back toward Herdon.

Q. Then you made another trip the length of your train back to your engine?

A. I did.

Q. And stopped there about five minutes that time?

A. Such a matter.

Q. And then made another trip the length of train 504 up to Mile Post 426?

A. Yes, but the train was not there.

Q. The train had gone and pulled out?

A. Yes, sir.

Q. So that you walked along the track?

A. I did.

Q. From the scene of the wreck to Mile Post 426?

A. Yes.

Q. When did you again return to your engine or to the caboose of your train?

A. In a short time. I couldn't exactly state the time. I was back to the caboose before it became daylight.

Q. You went clear back to the caboose of your train before it became daylight?

A. I did.

Q. Do you know what time the wrecker came out there to the scene of the wreck?

A. Well, it was some time after eight o'clock, I believe. I wouldn't say for certain.

Q. After eight o'clock on the morning of the wreck?

A. On the morning of the wreck. I was approaching—well, I don't know.

181 Q. You are not sure; it might have been seven o'clock?

A. Yes, as far as that part is concerned.

Q. About how far was the caboose of your train from Mile Post 426?

A. Well, in the vicinity of a half a mile.

Q. About how many car-lengths?

A. Close to eighty car-lengths, I should judge.

Q. And the ordinary box car or stock car is about how long, do you know?

A. Why, it varies between 34 and 40 feet, I believe.

Q. And what is the ordinary clearance between cars when they are coupled together?

A. Something like about two feet.

Q. Were you acquainted with the rules of the company at the time this accident occurred?

A. I was.

Q. What was the rule of the company with reference to the operation of trains when the block signals could not be observed by the persons operating the trains? What was required?

(Objected to as not proper cross-examination. Overruled. Exception.)

A. Why, I believe it is required that in the vicinity where the block is not able to be seen that you must send a flagman ahead and ascertain the position of the block before proceeding.

Q. In other words, you were required under the rules of the company to stop until they had found out whether or not the block was clear?

A. That is correct.

Q. Were you in the caboose of your train on Saturday morning?

A. I was.

182 Q. Did you see the snow plow approaching from the west?

A. I did.

Q. Did you hear that snow plow explode a torpedo in the vicinity of the rear of your train?

(Objected to as immaterial and not proper cross-examination. Sustained. Exception.)

Redirect by Mr. Halligan:

Q. Now, Mr. McGinnis, you say that the rules of the company with reference to these blocks are that when you can't see the block you have got to send a man out and find out; is that it?

A. The rules of the company are, if you don't know the condition of the block, the condition must be ascertained before moving, I believe.

Q. Who determines that? The brakeman?

A. He does not.

Q. Who does determine it?

A. I believe that is left to the engineer.

Q. The brakeman doesn't have anything to say about that, does he?

A. He is not in authority.

Q. Now I will ask you to state, in your opinion, how far you could have seen a fusee that night after you left Dix in the storm.

(Objected to as incompetent, irrelevant and immaterial, the witness not having shown himself qualified to answer. Overruled. Exception.)

A. With the variation of conditions it might have been seen fifty feet; perhaps not that far; maybe 100 feet at times.

183 Q. Was it daylight when the wrecker came out the next morning?

A. It was.

Q. How long was the wrecker there before they began to clear away the wreck and get the bodies?

A. I can't say, as I didn't stay on the wreck.

Q. Now, Mr. McGinnis, you stated that your clothes were wet that night because of your exposure out in the storm. Would your clothes freeze on you when you were out in that storm?

A. They would.

Q. And what would become of the snow that would blow in your face?

A. What would become of it?

Q. Yes; would it freeze over and form a coat on your face?

A. It did.

Q. Did you notice the condition of Conductor Phillips when he got in your engine?

A. Nothing more than the same condition that we were.

Q. Did you notice the ice on his face?

A. There was snow accumulated on his face.

Q. And how were his clothes?

A. More or less covered with snow.

Q. Now, as you looked out of the gangway that night and looked ahead of your engine, how far did that lantern that you had in the headlight illuminate the track ahead of the engine?

A. I don't know. I wasn't far enough to see the illumination.

Q. From where you were could you see any illumination from that headlight?

A. I could not.

Q. Now, when you left the wreck and went down to 426, which side of the train did you go on?

A. On the south side.

184 Q. Was there any track along there?

A. There was not at that time.

Q. I mean, had there been a track graded but the rails not laid?

A. There was a grade along there.

Q. And is that what you walked on, on that grade?

A. That grade was distributed with ties. I walked between the end of the ties and the track.

Q. You walked between the end of the ties on that track and the track that your train was on?

A. I did.

Q. About what distance was there between the ends of your ties and the ends of the ties that were lying south of you?

A. Oh, there was nothing uniform about it. They had just been thrown out there.

Recross-examination by Mr. Ellick:

Q. Notwithstanding these conditions of snow and ice accumulating on your face, you made two or three trips the entire length of two trains that night?

(Objected to as repetition. Sustained. Exception.)

(Witness excused.)

185 J. J. McConaghy, called as a witness on behalf of the plaintiff, and duly sworn, testified as follows:

Direct examination by Mr. Halligan:

Q. Give your name to the reporter.

A. J. J. McConaughy.

Q. Where do you reside, Mr. McConaughy?

A. Cheyenne, Laramie County, Wyoming.

Q. And how long have you resided there?

A. About nine years.

Q. Where did you reside previous to going to Cheyenne?

A. Sidney, Nebraska.

Q. And how long did you reside in Sidney?

A. Since 1887.

Q. What is your occupation?

A. Brakeman on the Colorado & Southern.

Q. What was your occupation of the 13th of March, 1913?

A. Conductor on the Union Pacific railroad.

Q. How long had you been conductor?

A. About nine years.

Q. And how long had you been braking on the road prior to that?

A. Two years.

Q. How long were you in the employ of the Union Pacific Railroad Company?

A. Eleven years; a little over.

Q. And in what service?

A. Two years brakeman and nine years as conductor.

Q. You were in the train service, were you, all the time?

A. Yes, sir.

186 Q. And on what division did you run during that time?

A. Fourth district of the Nebraska division.

Q. Between what points is the fourth district?

A. Cheyenne, Wyoming, and Sidney, Nebraska.

Q. Where were you on the afternoon and evening of March 13, 1913?

A. In Sidney, Nebraska.

Q. Were you called out to make a trip that day?

A. That night I was.

Q. About what time were you called?

A. Called for 10:50 P. M.

Q. That is, 10:50 in the evening?

A. Yes, sir.

Q. And when you say you were called for 10:50 P. M., what does that mean? That you are to report at that time, or what?

A. Be ready to leave at that time.

Q. What time did you leave?

A. At 1:10 A. M.

Q. What prevented you from leaving sooner, if anything?

A. We couldn't get an engine.

Q. Why couldn't you get the engine?

A. The turntable pit was full of snow and the engine couldn't be got out of the roundhouse.

Q. What was the condition of the weather at that time?

A. Storming.

Q. And to what extent was it storming?

A. It was very severe.

(Defendant moves to strike out the answer as a conclusion. Sustained. Exception.)

Q. Tell how the wind was blowing.

A. In my estimation it was blowing at least thirty-five miles an hour. It was strong, very strong.

187 (Defendant moves to strike out the statement that it was very strong as a conclusion of the witness. Sustained. Exception.)

Q. What effect did it have, the wind blowing, would you say—have upon a person walking around?

A. It made it very disagreeable. It was hard to get around.

Q. State if it was snowing or raining?

A. It was snowing.

Q. And to what extent was it snowing?

A. Snowing hard.

Q. And what effect did the snow and the wind at that time have upon your ability to get around and work that night?

A. The snow and wind made it blinding and so disagreeable that you could hardly get around and do any work.

Q. About the time that you left Sidney here, how far could you see into the storm?

A. At my location at the time, behind the Union Pacific hotel and the depot there, you could see a lantern three to four car-lengths.

Q. How many cars did you have in your train?

A. Forty-two.

Q. What kind of train was it?

A. A manifest train and stock.

Q. How many cars of stock did you have?

A. Six.

Q. What is a manifest train?

A. It is a merchandise, machinery, that has a special billing they call manifest; rush stuff.

Q. It is dead freight?

A. Yes.

188 Q. What kind of stock was it?

A. Hogs.

Q. Where were these hogs going?

A. I believe it was Portland, Oregon.

Q. Who was the assistant superintendent here that night?

A. G. D. Sage.

Q. Did you see Mr. Sage that evening?

A. Yes, sir.

Q. Where did you see him?

A. At different places about the yards.

Q. What are Mr. Sage's duties as assistant superintendent?

(Objected to because foundation is not laid. Sustained. Exception.)

Q. Do you know what his duties are as assistant superintendent?

A. Yes, sir.

Q. You may state what they are?

A. To look after the general welfare of the railroad company.

Q. What are his duties with reference to the trains? What control, if any, has he over the trains?

A. He has the general overseeing of the trains in his jurisdiction.

Q. What was Mr. Sage's jurisdiction there?

A. From Cheyenne, Wyoming, to Sidney, Nebraska.

Q. Did you have a conversation with him that night about this storm?

A. Yes, sir.

Q. What was that conversation?

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any of the issues in this case, and not eliciting any fact or statement that could in any way be binding upon the defendant under the issues in this case. Overruled. Exception.)

189 A. As to the severity of the storm and the running of the train out of the yard.

Q. What suggestion or requests, if any, did you make to Mr. Sage about your train?

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any of the issues in this case, and not eliciting any fact or statement that could in any way be binding upon the defendant under the issues in this case. Overruled. Exception.)

A. Owing to the severity of the storm, I suggested to split the train and run it in two sections.

Q. How many cars would that leave in each train?

A. It would be about twenty-one.

Q. What did Mr. Sage say with reference to that?

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any of the issues in this case, and not eliciting any fact or statement that could in any way be binding upon the defendant under the issues in this case. Overruled. Exception.)

A. "No damn use of running the damn train."

Q. About what time was that with reference to when you left here?

A. It was anyhow an hour before I left here.

Q. Who was your crew who went out with you that night?

A. Charles Richardson was engineer, Patrick Fallon was fireman, Henry Dean Palen was head brakeman, Chauncey L. Sweet was rear brakeman, and I was acting as conductor.

Q. State when you left Sidney how you proceeded to Mile Post 426?

A. Very slow.

190 Q. Was your train assisted out of the Sidney yard?

A. Yes, sir.

Q. By what?

A. A switch engine.

Q. And what time was it that you left Sidney?

A. 1:10 A. M. on the morning of the 14th.

Q. What time was it that you got to Mile Post 426?

A. At 3:05 A. M., the same morning.

Q. You were from 1:10 to 3:05 in going that distance?

A. Yes, sir.

Q. How many miles is it from Sidney to Mile Post 426?

A. Considered eleven miles.

Q. Was your train stopped on the way.

A. Not at all.

Q. What occasioned the delay?

A. The heft of the train and the severe wind.

Q. In what direction was the wind blowing that night?

A. From the northwest.

Q. What was the weather conditions prevailing after you left Sidney?

A. Very severe.

(Defendant moves to strike out the answer as a conclusion of the witness. Sustained. Exception.)

Q. How did the weather conditions compare, as you progressed west, with what they were at Sidney?

A. Practically the same, only we didn't have the protection that we had in the Sidney yards.

Q. Explain to the jury why you didn't have the protection you had in the yards.

A. They can notice those hills there close to the yards; there is quite a protection; and also the buildings and the hotels and the building on the other side would naturally break the wind.

191

Q. And how are the hills with reference to the railroad after you get west of Sidney?

A. A great deal farther from the track.

Q. How are the hills with reference to the track at Mile Post 426?

A. It is just a gradual slope back for probably two miles.

Q. When you got to Mile Post 426, what did you do?

A. I proceeded to the head end of my train.

Q. How did you proceed? How was it necessary for you to go there?

A. Walked backwards.

(Defendant moves to strike out the answer as a conclusion. Sustained. Exception.)

Q. How did you proceed from the rear end to the head end?

A. Walked.

Q. How did you walk?

A. Backwards.

Q. Why did you walk backwards?

(Objected to as calling for a conclusion of the witness. Overruled. Exception.)

A. The severity of the storm I couldn't face.

Q. What side of the train did you walk on?

A. The south side.

Q. What is the condition of the track where you stopped with reference to being a single or double-track road?

A. It was double track.

Q. And on which track was your train, the north or the south track?

A. The north track.

192 Q. And in going from the rear end to the head end of your train where were you walking with reference to the two tracks?

A. Between them.

Q. State how the wind was blowing at that time?

A. Thirty-five or forty miles an hour.

Q. How about the snow?

A. The snow was very thick.

Q. How far could you see a lantern there at that time in the storm?

A. Not over a half a car-length.

Q. When you got to the head end of your train, what did you ascertain with reference to its condition?

A. I first met my engineer. He said he was out of water.

Q. What did you do then?

A. Cut the engine off of my train.

Q. And what did you do after that?

A. I then climbed up into the cab.

Q. How long did you stay there?

A. Probably two, maybe three minutes.

Q. What was the condition of the headlight on the engine at that time?

A. I didn't see any at all. I hadn't been ahead of it yet.

Q. Did you afterwards notice?

A. No, sir, there was none.

(Defendant moves to strike out the answer as not responsive. Sustained. Exception.)

Q. I will ask you if you afterwards noticed whether there was a headlight or not *in* that engine.

A. It was not burning.

(Defendant moves to strike out the answer as not responsive. Sustained. Exception.)

193 Q. I am asking you whether you saw whether there was one or not. Do you understand?

A. No, I don't understand just what you mean.

Q. Did you see whether there was or not?

A. Yes.

Q. Now state whether there was a headlight or not on that engine.

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any of the issues in this case, nor any act of negligence charged in the petition of the plaintiff. Overruled. Exception.)

A. Not burning.

Q. Where did you go then?

A. To the office at Mile Post 426.

Q. Who was at the office when you got there?

A. There was two operators.

Q. And how were train orders given and taken at that office that night?

A. By telephone.

Q. Did you have any communication with the train dispatcher through the operators there that night?

A. Yes, sir.

Q. How soon after you arrived at the depot was it?

A. About five minutes.

Q. Now state what that communication was.

A. It was concerning the weather; to let 504 go.

Q. What did you tell him concerning the weather?

A. I told him we couldn't see; the storm was so severe we couldn't see, and to let Extra 504 go.

Q. What did you say to him about having the engine of your train taken to Sidney?

194 A. Letting Extra 501 East pick up engine 510.

Q. And what reply did you get from him?

A. That Extra 504 East would pick up engine 510 and get out of there.

Q. Now, what did you do after you had that conversation with the dispatcher?

A. Waited for the arrival of Extra 504 East.

Q. Did you clean out the switch that night?

A. Yes, sir.

Q. When did you do that with reference to going to the station?

A. Almost immediately after I had first arrived at the station.

Q. When you went up to the head end of your train you say you went into the engine cab?

A. Yes, sir.

Q. How long did you remain there?

A. Probably two, maybe three minutes.

Q. And then where did you go?

A. To the station.

Q. Did you stop at the switch?

A. No, sir.

Q. Then where did you go from the station?

A. To the switch.

Q. Who was with you?

A. Henry Dean Palen, my head brakeman.

Q. How did you find the switch?

A. It was right by the corner of the office. I couldn't miss it.

Q. But how was it set?

A. It was what we call half-cocked; not set for either track.

Q. What would have been the effect of that upon 504 if they had arrived before you did?

A. They would have been derailed.

195 Q. What did you do then at the switch?

A. Cleaned it out and properly threw the switch.

Q. How did you clean it out?

A. We had a fire shovel and a broom and another broom they call the switch broom.

Q. Where are these brooms carried, and the shovel?

A. The shovel and one broom was in the office. The switch broom was by the switch stand.

Q. How long did it take you to clean out the switch at that time?

A. Probably seven or eight minutes.

Q. When you found the switch half thrown, what was the condition of the snow there between the rails, and why did you have to clean it out?

A. The snow drifted between the points of the rail so you couldn't properly throw the switch, and it was practically level with the rails.

Q. And when you attempted to throw the switch, what prevented you from being able to do it?

A. The snow between the switch point and the rail.

Q. Is this what is called the split switch?

A. Yes, sir.

Q. Now, how did you manage for a light there at that time, to see how to clean the switch?

A. At that particular time we worked without a light.

Q. And how long was it after you got the switch cleaned out before 504 came along?

A. Probably five minutes.

Q. And where did the other engine stop with reference to yours?

A. Pretty near opposite; a little bit west of mine.

Q. How far was your engine from the switch that you were cleaning out?

196 A. About five car-lengths; four or five.

Q. Now tell what switch this was that you cleaned out there and found in that condition.

A. It was the switch at the end of the double track at Mile Post 426.

Q. Where the double tracks converge on to the single track?

A. Yes, sir.

Q. After 504 arrived at Mile Post 426, what was done?

A. I starts out to notify them what had to be done.

Q. Who did you notify?

A. Brakeman McManus.

Q. And what occurred afterwards?

A. He proceeds to his engine to deliver the instructions to his engineer.

Q. And what occurred after that? What did they finally do with engine 504?

A. Run it down on the eastbound track so as I could cut in engine 510.

Q. Were you in the office during the time that Brakeman McManus was in there getting orders.

A. I was a little later.

Q. Did you hear any of the conversation with the dispatcher being conducted there?

A. Yes, sir.

Q. State what it was.

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any of the issues in this case, and had at a time when it could not possibly be any notice to the company upon which they could predicate a cause of action in this case. Sustained. Exception.)

197 Q. At that time who was in the station house at Mile Post 426?

A. What time?

Q. This time when you heard this conversation with McManus or some one over the phone, who was there?

A. Two operators; Henry Dean Palen, my head brakeman; Brakeman McManus.

Q. And yourself?

A. Yes, sir.

Q. How long were you in the station at that time?

A. Probably two or three minutes.

Q. And then where did you go?

A. I stepped just outside.

Q. Where did you go from there?

A. I staid there by the switch to clean it out as soon as the move was made.

Q. Had the switch been cleaned out the first time prior to the time 504 came down?

A. Yes, sir.

Q. And at that time that you were in the office with Brakeman McManus, had the engine from 504 been cut off?

A. It had been cut off, but it had not moved.

Q. After you came out of the office did you move engine 504, or did some one move it?

A. Yes, sir.

Q. Where did they move it?

A. Down on the eastbound main, just in the clear.

Q. How many cars did they take down with it?

A. About five.

Q. Then what did you do?

A. Proceeded to clean the switch.

198 Q. Why was it necessary to clean the switch?

A. Because it had snowed in; drifted full.

Q. And did you want to throw the switch?

A. Yes, sir.

Q. For what purpose did you want to throw the switch?

A. To cut engine 510 into the train.

Q. Did you get the switch thrown and cleaned out?

A. No, sir.

Q. What I am asking you is, did you get the switch thrown so that you could put engine 510 on to that train?

A. Yes, sir.

Q. How long were you in cleaning out that switch and throwing it?

A. Probably eight minutes; ten maybe.

Q. Did you have your lanterns there?

A. If I remember right my lantern was sitting to one side.

Q. How far could you see a lantern at that time in that storm?

A. Eight or ten feet probably.

Q. Did you light any fuses at the time you were cleaning out the switch?

A. Yes, sir.

Q. How many?

A. I believe I burned about three of them.

Q. For what purpose did you light the fuses?

A. Trying to see to work by.

Q. To work at the switch by?

A. Yes, sir.

Q. How far could you see a fusee in that storm that night?

A. On an average not over a car-length.

Q. I suppose there were different periods in the storm when you could see farther than others, were there?

A. Yes, sir, slightly.

199 Q. Now, after you cleaned out the switch that time, then what did you do? That would be the second time.

A. Coupled engine 510 into Extra 504's train.

Q. You just took the engine and tender, did you, off of 510?

A. Yes, sir.

Q. Then what did you do?

A. Crawled up in the cab and told the engineer he would have to shove the train back.

Q. Which train back?

A. Extra 504's train back.

Q. Why did you do that?

A. Because the train had run down so close to the switch that I couldn't get my engine on to the train and clear the switch for the eastbound main.

Q. What were you doing at the time the train ran down?

A. Cleaning out the switch.

Q. And how did you notice the train? What did you notice about the train running down toward the switch?

A. I heard the squeak of the wheels in the snow and raised up, and the end of the first car was right by me.

Q. How far was the end of the car from you when you noticed it?

A. I could touch it.

Q. Had it stopped?

A. Yes, sir.

Q. About how far was that car from the switch at the time you cut off the other cars and moved them up on to the eastbound main?

A. Two car-lengths.

Q. How far was the car from you at the time that you first heard something, the snow and the wheels?

A. Practically just as it stopped.

200 Q. What was done after you directed the train to be shoved back?

A. They waited two or three minutes, and the engineer on 510 whistled "broke in two."

Q. How did he whistle that?

A. Three long blasts of the whistle.

Q. How did you ascertain, or the engineer ascertain, that the train was broke in two?

A. We had coupled in the air, and he couldn't get air on his gauge in the engine.

Q. What was the condition of the brakes on the train when it moved down towards you, if you know?

A. I am unable to say.

Q. And do you know whether the brakes were set or otherwise when the engineer coupled on?

A. I do not.

Q. What would have been the result on the gauge indicating air pressure in the brakes? Would that have released them, or did you have to manipulate the air in order to release or set the brakes?

A. At that present time it would set the brakes if they had air in the train before they stopped.

Q. Well, after the engineer whistled "train broke in two," what was done?

A. The brakeman and I started for the portion of 504 that we had cut off, thinking that he would take it for a back-up signal.

Q. Could you see 504 from where you were?

A. No, sir.

Q. I mean your engine of 504, that part of your train that had been cut off, from where you were at the switch.

A. The part of 504 that was cut off?

201 Q. Yes.

A. No, sir, I couldn't see it.

Q. And how far was that from you?

A. Probably four car-lengths.

Q. Could you see a lantern that distance?

A. No, sir.

Q. Did you notice whether or not there was a light in the head-light of 504?

A. I did not.

Q. Did you go down to the engine of 504, your engine, then?

A. A little later, yes.

Q. Then what did you do?

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any of the issues in this case, and shown by the witness to be something that occurred after the wreck. Overruled. Exception.)

A. Proceeded to the cut-off portion of 504 and pulled the angle cock so as to stop him.

Q. Then did you go to engine 504?

A. I believe I did. Yes, sir, I did.

Q. And where did you go from there?

A. Back to the 510.

Q. How far could you see the depot that night at Mile Post 426?

A. Not until we ran into it almost.

Q. Was there an order board there at that depot?

A. Yes, sir.

Q. How far could you see that order board?

A. Probably eight or ten feet.

Q. How do you mean—eight or ten feet either side of the order board, or could you see the light at the order board?

202 A. I don't remember seeing the light at all.

Q. Now, then, this order board; tell the jury what it is and how it is operated.

A. The order board is operated manually. It is a semaphore operated by the operator, stating to trains when they have orders for that train.

Q. It is not connected with the automatic block signal in any way, is it?

A. No, sir.

Q. Operated by the telegraph operator at the station?

A. Yes, sir.

Q. I think you stated that your car was on the north double track?

A. My train was, yes, sir.

Q. Are you familiar with the block signals on that road there between Mile Post 426 and, say Point of Rocks?

A. Yes, sir.

Q. Where is the first block signal west of Mile Post 426 governing an eastbound train? I mean, where was it at that time?

A. About fifty yards west of the station, I should guess.

Q. And what kind of a signal was that?

A. It was a home block signal.

Q. Describe to the jury what a home block signal is.

A. It is a signal governing the entrance to a block.

Q. Now, what lights does it display in the night season?

A. Red or green.

Q. And what does the red light indicate to the men operating the trains going east?

A. To stop.

203 Q. And what does the green light indicate?

A. Proceed.

Q. Now, where are these block signals located, governing the eastbound trains, with reference to the track? Are they on the north side or the south side of the track?

A. South side.

Q. At that time I believe the track between Dix and Mile Post 426 was a single track, was it?

A. Yes, sir.

Q. And had there been some grading between Point of Rocks and Mile Post 426 for a double track at that time?

A. Yes, sir.

Q. Where were these block signals with reference to the track that was then in operation? I mean, what distance from the track would they be?

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any of the issues in this case or any acts of negligence charged. Overruled. Exception.)

A. About eighteen to twenty feet.

Q. Now, then, about how far is Point of Rocks, the point on the track called Point of Rocks, west of Mile Post 426?

A. About two miles and a half.

Q. Now, taking up again these block signals at the first block which you have stated was the home block signal west of the station at 426 governing eastbound trains, I will ask you where the next block signal was west of that point governing eastbound trains. Remember that all of these blocks I am asking you about are the ones that govern the eastbound trains, not the west.

204 (Objected to as immaterial and a repetition.

By the Court: With the admission of counsel that he is not making any claim that the signals were not working properly, it seems to the court that this would not be material.

Objection overruled. Defendant excepts.)

A. It was about a half a mile.

Q. And what kind of a signal was that?

A. A distance or caution signal.

Q. Tell the jury what a distance or caution signal is.

A. It is a signal in addition to the home block signal governing the approach of trains to the home block signal.

Q. What lights are displayed by the distance signal?

A. At night?

Q. Yes, at night.

Q. Yellow.

Q. Is there another light displayed at other times besides yellow?
Are there two lights on the distance signal?

A. Yes, sir.

Q. What is the other light?

A. Green.

Q. Now, what are the duties of the trainmen when approaching a distance signal that displays a yellow light?

A. To get the train under control.

Q. And proceed, or stand still?

A. Proceed expecting to find the next home block signal red or at "stop."

Q. What do you mean by "the train under control"?

A. To stop in the distance the track is seen to be clear.

Q. Where is the next block signal on this line governing eastbound trains, west of this distance signal you have just described?

205 A. About a half a mile.

Q. And where is that located with reference to Herdon?

A. East switch, sidetrack Herdon.

Q. What kind of a signal is that?

A. Home signal.

Q. And what lights are displayed on that signal?

A. Red and green.

Q. Where is the next signal west of the home signal you have just described which is at the east end of the Herdon switch?

A. At the west switch, Herdon sidetrack.

Q. How far is that from the block signal you have described as being at the east end of the Herdon switch?

A. A little over a half a mile.

Q. What kind of a signal is at the west end of the Herdon switch?

A. A home block signal.

Q. What lights are displayed on it?

A. Red and green.

Q. What signal is the next signal west of the home block at the West Herdon switch? Which is the next signal governing eastbound trains?

A. A distance signal about a half a mile west.

Q. Similar to the distance signal you have just described?

A. Yes, sir.

Q. And that, you say, is about a half a mile west of the west end of the Herdon switch?

A. About a half a mile west of the Herdon switch.

Q. How far west of that is it before there is another block signal governing eastbound trains?

A. Just about a mile.

Q. What kind of a signal is that?

A. That is an intermediate home block signal.

206- Q. What is an intermediate home block signal?

A. It is the same as a home block signal at the switch, with the exception that it is placed between sidetracks.

Q. That is, there is no sidetrack at that signal?

A. No, sir.

Q. Straight track?

A. Well, not a straight track.

Q. I mean, there is but one track there?

A. One track, yes, sir.

Q. There are no buildings there, or switches, or anything like that?

A. No, sir.

Q. And do you call all of the signals that are located between switches intermediate home block signals?

A. If they are home block signals they are intermediate.

Q. That display red and green?

A. Yes, sir.

Q. They would be intermediate signals?

A. Intermediate, yes, sir.

Q. And how far did you say that was west of Herdon?

A. About a mile and a half west of Herdon.

Q. And how far is that from Point of Rocks?

A. It is almost on the direct point.

Q. And how far is that signal from Mile Post 426?

A. About two miles and a half.

Q. Now, what effect does a train on the track have upon the home block signal or intermediate home block signal immediately in its rear, that is, in the rear of the train? I mean, what kind of lights will be displayed at the signal?

A. If the train is in the block which this block signal is controlling, a home block signal would show red.

207 Q. What do you mean by "in the block," Mr. McConaughy?

A. A certain length of track, or track of defined limits, that this home block signal governs.

Q. Now, is the distance from one home block signal to another, is that a block?

A. No, sir, they lap.

Q. Then the block is really more than the distance between the two signals?

A. Yes, sir.

Q. Is there any uniformity about how much they do lap, or does that depend upon the curves and the condition of the track?

A. It depends upon the curves of the track mostly.

Q. And you say, I believe, that a train on the track, while in the block controlled by the home block signal to its rear, will cause the block signal to display a red light in the night time?

A. Yes, sir.

Q. Mr. McConaughy, did you see the fire at the wreck that night?

A. No, sir.

Q. Why didn't you see it?

A. The storm was too severe.

Q. Were you watching the signals when you left Sidney?

A. No, sir.

Q. Did you watch any between Sidney and 426?

A. On my return trip.

Q. What time did you return?

A. It was about seven o'clock in the morning when I arrived at Sidney; near that. I don't know exactly.

Q. How did you watch the signals?

A. Stood in the gangway of engine 504.

208 Q. And how many signals did you see between 426 and Sidney?

(Objected to as incompetent, irrelevant, and immaterial. Sustained. Exception.)

Q. You say you have lived in this vicinity since 1886?

A. 1887.

Q. I will ask you to state how the storm that was prevailing the night of this accident compares with others of the worst storms that have occurred during your residence here.

A. It was equal in severity to any I ever saw here.

Q. How did the storm compare at Sidney and at Mile Post 426?

A. It didn't appear as heavy at Sidney as it did at Mile Post 426.

Q. When you got to Mile Post 426, what did you do with reference to flagging train 504, if anything?

A. I didn't do anything myself.

Q. What did you direct to be done?

(Objected to as incompetent, irrelevant, immaterial, and calling for hear-say. Sustained. Exception.)

Q. Whom did you direct?

A. I didn't direct anybody.

Q. I understood you to say you directed some one else to flag 504?

A. It was attempted by my brakeman prior to my arrival at the mile post.

Q. Did you see him when he left there or not?

A. No, sir.

Q. The evidence shows that the regular headlight in engine 504 had become extinguished and that there had been a common white lantern placed in the headlight in lieu of the acetylene light. I will ask you how far you could have seen that light that night at the time you were at Mile Post 426.

209 (Objected to for the reason that the witness has already stated that he did not examine the headlight on engine 504, and is not qualified therefore to state how far it could be seen. Sustained. Exception.)

Q. Well, how far could you have seen a white lantern that night in that storm?

(Objected to as repetition. Sustained. Exception.)

Q. Where were you when train 504 came up to Mile Post 426 station?

A. In the office.

Q. Did you hear the train whistle?

A. For the board, yes.

Q. Where was the engine when it whistled for the board?

A. Passing the station.

Q. And how far did the engine get past the station when it stopped?

A. About three car-lengths.

Q. Where do the rules require the engines to whistle for the boards at the station? Is there any rule on that proposition?

(Objected to unless the witness shows that he is acquainted with the rules of the company. Sustained. Exception.)

Q. Are you acquainted with the rules of the company, Mr. McConaughy?

A. Slightly.

Q. Are you acquainted with the rule with reference to where the engineer shall whistle for signals?

A. Yes, sir.

Q. How far from the station is he required to whistle?

A. For the board, do you mean?

Q. For the board, yes.

210 A. It is most anywhere between the whistling post and the station.

Q. Now, from your experience, Mr. McConaughy, as a railroad man, I will ask you to state how, in your opinion, trains 501 and 504 should have been operated that night, taking into consideration the condition of the weather.

(Objected to as incompetent, irrelevant, and immaterial, calling for the conclusion and opinion of the witness upon a question that is not a matter of expert opinion, and no sufficient foundation laid, the witness not having shown himself qualified to answer. Sustained. Exception.)

(Plaintiff's Exhibit B is identified.)

Q. I hand you plaintiff's Exhibit B and ask you to state what it is, Mr. McConaughy.

A. Book of rules used by the operating department of the Union Pacific.

Q. And is that the book of rules that was in force on the 13th and 14th days of March, 1913?

A. Yes, sir.

Q. Calling your attention to Rule 504, on Page 101, I will ask you if that rule relates to the operation of trains when approaching block signals.

A. Yes, sir.

Q. Was that rule in force on the 13th and 14th days of March, 1913?

A. To my best recollection it was.

Q. Are you able to state whether it was or not?

A. Yes, it was in effect.

(Plaintiff offers Rule 504 in evidence. Objected to as incompetent, irrelevant, and immaterial, and for the reason that it is
211 not plead, and for the reason that it is immaterial under the testimony put in by the plaintiff as shown by the record. Overruled. Exception.)

(Mr. Halligan: I ask to read it into the record: "504. When a train is stopped by a block signal it may proceed when the signal is clear. On single track send a flagman in advance immediately. Wait the full time indicated by the special rules on the time table after the flagman has started, and then proceed under control to the next clear signal; or, if the signal next in advance is in plain view, and the track ahead is seen to be clear, proceed under control not exceeding six miles per hour. On double track a train may proceed after waiting one minute, running under control.")

Q. Calling your attention to Rule 305, I will ask you if that rule was in force at that time.

A. Yes, sir.

(Plaintiff offers Rule 305 in evidence and asks to have it read into the record. Objected to for the reason that it is not plead and as incompetent, irrelevant, and immaterial in view of the testimony already offered by the plaintiff. Overruled. Exception. Read to jury by Mr. Halligan as follows: "305. Firemen as well as engine-men must watch signals closely, as frequently the first view can be had from the fireman's side.")

212 Q. Calling your attention to 508, I will ask you if that rule was in effect on March 13th and 14th, 1913.

A. Yes, sir.

(Plaintiff offers Rule 508 in evidence. Objected to as incompetent, irrelevant, and immaterial, and for the reason that it is not plead in the petition. Sustained. Exception.)

Q. Calling your attention to Rule Number 893, I will ask you, Mr. McConaughy, if that was in force on March 13th and 14th, 1913.

A. Yes, sir.

(Plaintiff offers Rule 893 in evidence and asks to have it read into the record. Objected to for the reason that the same is not plead, and is incompetent, irrelevant, and immaterial. Overruled. Exception. Read to jury by Mr. Halligan, as follows: "893. During foggy or stormy weather do not attempt to recover lost time. Take extraordinary precautions both at switches and at all places where authority to proceed depends upon signals.")

Q. Calling your attention to Rule 106, I will ask you if that rule was in force on the 13th and 14th of March, 1913.

A. Yes, sir.

(Plaintiff offers Rule 106 in evidence and asks to read it into the

record. Objected to for the reason that it is not plead in the petition and is incompetent, irrelevant, and immaterial. Overruled. Exception. Read to the jury by Mr. Halligan, as follows:

213 "106. In all cases of doubt or uncertainty, the safe course must be taken and no risks run.")

Q. Calling your attention to Rule 304, I will ask you to state if that rule was in force on the 13th and 14th days of March last.

A. Yes, sir.

(Plaintiff offers Rule 304 in evidence. Objected to for the reason that the same is not plead and is incompetent, irrelevant, and immaterial. Overruled. Exception. Read to the jury by Mr. Halligan, as follows: "304. In foggy or stormy weather, enginemen must approach both distance and home signals with great care and have their trains under control.")

Q. Calling your attention to the definition of the term "under control," on Page 9 of this book, Exhibit B, I will ask you to state if that definition of the term was in force on March 13th and 14th, 1913, that being the official definition of "under control."

A. Yes, sir.

(Plaintiff offers the term "under control" and the definition thereof as shown in the rule book identified by the witness. Objected to for the reason that it is not plead and is incompetent, irrelevant, and immaterial. Overruled. Exception. Read to the jury by Mr. Halligan, as follows: "Under control. To be able to stop within the distance track is seen to be clear.")

Q. I will ask you, Mr. McConaughy, what length of time elapsed between the time you left the rear end of your train

214 and the time you got to the front end, to the engine. How long did it take you to go from the rear to the front?

A. Thirty-five minutes.

Q. And what was the cause of the time consumed in going that distance?

A. The strong wind and storm, so that I had to walk backwards.

Q. And how was the snow there at that time as to depth?

A. Practically all in the air; drifting some.

Q. Was it lying between the tracks there?

A. Some, yes, sir.

Q. Now, as to that snow, state what kind of snow it was, whether when it fell against anything it would stick to it and freeze there.

(Objected to as leading and suggestive. Overruled. Exception.)

A. Yes, sir, it would stick and freeze there.

Q. Now, at the time that you were cleaning out the switch, when this train 504, that part that had been detached from the engine, moved down on to you, I will ask you what light you had there at that time, if any.

A. I had a fusee.

Q. How close did the cars get to you when you saw them first?

A. I could reach them.

Q. And how far was your fusee from you at that time?

A. Probably five or six feet.

Cross-examination by Mr. Ellick:

Q. You say that it took you thirty-five minutes to go from the rear of your train to the head of your train?

215 A. Yes, sir.

Q. Did you note the time that you started and note the time that you got up to the head of your train?

A. I did.

Q. And you are positive that it was thirty-five minutes?

A. To the time I crawled in the cab.

Q. And that was when you looked at your watch?

A. Yes, sir.

Q. Did you crawl in the cab as soon as you got up there?

A. As soon as I cut the engine off.

Q. How long did it take you to cut the engine off?

A. About a minute.

Q. So that you were only delayed about a minute on the way from the rear of your train to the head of your train?

A. Yes, sir.

Q. You testified at the coroner's inquest, did you not?

A. Yes, sir.

Q. You were sworn as a witness in that hearing?

A. Yes, sir.

Q. Were you asked at that hearing the question as to the time it took you to proceed from the rear of your train to the head end of your train?

A. I believe I was.

Q. I call your attention to the following questions and answers and ask you if they were propounded to you at that inquiry and were answered by you as follows: "Question—Did you leave the rear of the train and go to the head end? Answer—Yes, sir. Question—What time did you stop there? Answer—3:15. Question—What time did you arrive at the office? Answer—3:40. Question—It took you twenty-five minutes to get to the head end? Answer—

Yes, sir."

216 A. That 3:15 was a mistake.

Q. Will you say that you did not testify that way at the coroner's inquest?

A. To my understanding I did not testify that way.

Q. What time did you leave the rear end of your train?

A. At 3:05 A. M.

Q. And when was that with reference to the time your train stopped?

A. Immediately to the stop.

Q. You say that the answer here, 3:15 is a mistake?

A. Yes, sir.

Q. What do you say with reference to this answer to this question: "Question—It took you twenty-five minutes to get to the head end? Answer—Yes, sir."

A. It should have been thirty-five.

Q. You say that that is also a mistake?

A. They might have misunderstood me.

Q. Did you or did you not make that answer at the coroner's inquest?

A. Twenty-five minutes?

Q. Yes.

A. I did not.

Q. How do you happen to be so acquainted with the rules of the company?

A. I worked for them for several years.

Q. Is it the duty of trainmen to familiarize themselves with the rules of the company?

A. Yes, sir.

Q. And that applies to brakemen, conductors, engineers, and firemen, does it not?

A. All concerned.

217 Q. And those employees that I name are all concerned?

A. Yes, sir, and a great deal more.

Q. Are there any other rules of the company provided for the protection of trains, other than those you have identified?

A. There is.

Q. Are you acquainted with Rule 99? (Hearing witness Exhibit B.)

A. Yes, sir.

Q. Was that rule in force on the Union Pacific Railroad Company and on this division at the time of this wreck?

A. To my best recollection.

(Defendant offers in evidence as part of the cross-examination of this witness Rule 99. To which plaintiff objects for the reason that it is improper cross-examination and an attempt to make the evidence of the defendant at this time. Overruled. Exception. Read to the jury by Mr. Ellick, as follows: "When a train stops or is delayed under circumstances in which it may be overtaken by another train, a flagman must go back immediately with stop signals a sufficient distance to insure full protection. One-fourth of a mile from the rear of the train he will place one torpedo on the rail; continuing back one-half mile from the rear of his train, he will place two torpedoes on the rail, two rail-lengths apart. He may then return to the single torpedo, where he must remain until relieved by another flagman or is recalled by the whistle of his engine. When

218 recalled, if he does not see or hear an approaching train, the single torpedo will be removed, but not before. If conditions warrant, a red fusee must be displayed to protect his train while returning. During foggy or stormy weather, in the vicinity of obscure curves or descending grades, or if other conditions require it, the flagman will increase the distance. Should a train be seen or heard approaching before the flagman has reached the required distance, he must at once place one torpedo on the rail, and if by night or during foggy or stormy weather, display a red fusee, continuing in the direction of the approaching train. If the flag-

man is recalled before reaching the required distance, he will if necessary place two torpedoes on the rail, two rail-lengths apart, by day, and by night display a red fusee in addition to protect his train while returning. When a train is flagged, the engineman must obtain a thorough explanation of the cause, stopping if necessary. The front of a train must be protected in the same manner when necessary. Conductors are responsible for the full protection of their trains in both directions and under all conditions.

In block signal districts, where the automatic home block signal governing the track in use can be plainly seen at the rear of the train to be at "stop," its location being not less than one-half mile from the train to be protected, it will be unnecessary for a flagman to go back. The indication of the signal at the time the train passes must not govern the modification of the flagging.")

219 Q. What is meant in that rule where it says that the flagman must go back immediately with stop signals? What is meant by stop signals—fusees and torpedoes?

(Objected to as immaterial and not proper cross-examination.

By the Court: The plaintiff has shown by the witness on the stand that he was an employee of the company and was familiar with the rules of the company, and identified by him certain fixed rules of the company. In consideration that it is fair to the defendant to be able to show by the same witness that there were other rules, as well as the rules identified by the witness, governing and controlling in the management of trains, the objection is overruled. Plaintiff Excepts.)

A. Yes, sir.

Q. I will call your attention to Rule 7 and ask you if that rule was in force on the Union Pacific Railroad Company on the Fourth Nebraska Division at the time of this wreck.

A. Yes, sir.

(Defendant offers Rule 7 in evidence. Objected to as not proper cross-examination and an attempt to make the evidence of the defendant at this time. Overruled. Exception. Read to the jury by Mr. Ellick, as follows: "Employees whose duties may require them to give signals must provide themselves with the proper appliances, keep them in good order and ready for immediate use.")

Q. I call your attention to Rule 11, and ask you if that rule was in force on the road of the Union Pacific Railroad Company
220 on the Fourth Nebraska Division at the time of this wreck.

A. There was part of that rule in force.

Q. Which part?

A. Fusees burning red.

Q. This part up here (indicating), down to where it says "11-A"?

A. The first half of that ruling right there. (Pointing.)

Q. You mean the first sentence of that rule?

A. Yes, sir.

(Defendant offers in evidence the first sentence of Rule 11.

Objected to as not proper cross-examination and an attempt to make the evidence of the defendant at this time. Overruled. Exception.

Read to the jury by Mr. Ellick, as follows:

"A fusee on or near the track, burning red, must not be passed until burned out.")

A. Use it all. It was all in force.

(Defendant offers in evidence the second sentence of Rule 11.

Objected to as not proper cross-examination and an attempt to make the evidence of the defendant at this time. Overruled. Exception.

Read to the jury by Mr. Ellick, as follows:

"When burning yellow, it is a caution signal.")

Q. I call your attention to Rule 15 and ask you if that rule was in force on the Fourth Nebraska Division of the Union Pacific Railroad Company at the time of this wreck.

A. Yes, sir.

221 (Defendant offers Rule 15 in evidence.

Objected to as not proper cross-examination and an attempt to make the evidence of the defendant at this time. Overruled. Exception.

Read to the jury by Mr. Ellick, as follows:

"The explosion of one torpedo is a signal to stop. The explosion of two, not more than two rail-lengths apart, is a signal to reduce speed and look out for a stop signal.")

Q. I call your attention to Rule 502 and ask you if that rule was in force on the Fourth Nebraska Division of the Union Pacific Railroad Company at the time of this wreck.

A. Yes, sir.

(Defendant offers in evidence Rule 502.

Admitted without objection, and read to the jury by Mr. Ellick, as follows:

"Block signals control the use of the blocks, but unless otherwise provided do not affect the movements of trains under the time table or train rules, nor dispense with the use or the observance of other signals whenever they may be required.")

Q. Is the rear brakeman on a freight train known as the signal man or flagman?

A. Flagman.

Q. And he is the signal man for the protection of the rear of the train?

A. He is a flagman for the protection of the rear of the train.

Q. Well, he handles the signals, doesn't he?

A. Yes, sir.

Q. And his duties are connected with the movement of the train?

A. Yes, sir.

222 Q. You may examine Rule 751 and state if that rule was in force on the Fourth Nebraska Division of the Union Pacific Railroad Company at the time of this wreck.

A. Yes, sir, it was.

(Defendant offers Rule 751 in evidence.

Admitted without objection, and read to the jury by Mr. Ellick, as follows:

"Conductors, enginemen, and train and yard men, signal men, operators, and others whose duties are connected with the movement of trains, must familiarize themselves with the rules governing the duties of others as well as their own, and must be prepared in case of emergency to act in any capacity to protect the safety of trains.")

Q. I call your attention to the plat marked by the reporter Defendant's Exhibit One, and ask you if that correctly represents the right of way of the Union Pacific Railroad Company from Mile Post 430, just west of the Point of Rocks, to Mile Post 426, with reference to the block signals and the distances that those block signals are apart, and as to the character of those block signals.

(Objected to as not proper cross-examination because the witness has not been asked in regard to this map, it was not prepared by him, but shows that it was prepared by a civil engineer, and is technical in its nature. Overruled. Exception.)

A. I am short on one signal.

(Defendant withdraws its offer of the following words in Rule 99:

223 "In block signal districts, where the automatic home block signal governing the track in use can be plainly seen at the rear of the train to be at "stop," its location being not less than one-half mile from the train to be protected, it will be unnecessary for a flagman to go back. The indication of the signal at the time the train passes must not govern the modification of the flagging."

Plaintiff objects to the withdrawal, as we are now proceeding on the theory that they offered this not as cross-examination but as independent evidence.

Mr. Rich: We do not care whether it is withdrawn or not, but I have been informed that that was not in effect at the time in question, and in fairness to the court we are willing to withdraw it.

By the Court: By the statement of counsel, the portion of Rule 99 that has just been read was not in force at the time of the wreck involved herein, and the same is stricken from the record.)

Q. Is the map as to distances and the location of other signals than the one signal that you think is not shown on this map, correct?

(Objected to because the witness has not shown that he understands the map or that he made it himself. Overruled. Exception.)

A. It is very good, to my knowledge.

Q. Point out wherein you think that map or plat, Defendant's Exhibit One, is not accurate.

(Objected to as not proper cross-examination. Sustained. Exception.)

224 Q. Are all of the block signals between Mile Post 430, just west of the Point of Rocks, and Mile Post 426 shown upon this map?

(Objected to as not proper cross-examination. Overruled. Exception.)

A. To my remembrance there was a distance signal a half a mile west of Mile Post 426.

Q. Otherwise are the block signals between Mile Post 430, west of Point of Rocks, and Mile Post 426 correctly and properly shown on this map?

A. Yes, sir.

Q. In addition to signals such as a fusee and a torpedo, is the flagman at the rear of the train also required to carry a lantern?

A. At night?

Q. At night, yes.

A. Yes, sir.

Q. He is supplied with two lanterns, is he, what they call a white lantern and a red lantern?

A. Yes, sir.

Q. And it is his duty to take those lanterns with him when he goes back to flag and protect his train?

A. Yes, sir.

Q. And does red in a lantern have the same significance as red in a block signal or in a fusee?

A. Yes, sir.

Q. Now, you said something about a conversation that you had with Mr. Sage before you left the yards at Sidney, to the effect that you told him or suggested to him that your train ought to be split. Did you at that time tell him the reason why you thought your train ought to be split?

A. Yes, sir.

225 Q. And what reason did you tell him?

A. In the severity of the storm the engine could not pull the train to Potter for water.

Q. I call your attention to your testimony at the coroner's inquest and ask you if you were asked the following questions and answered them in this manner: "Question—You may state to the jury what the conversation was that you had with Mr. Sage. Answer—Mr. Sage came from the roundhouse. We were talking at the turntable, and he goes in the office, and I asked him why he didn't split that train. Question—What did he say to you then? Answer—Just as well not to run a train at all. Question—Did you tell him why you thought the train ought to be divided? Answer—I had no opportunity. I was rebuked. I had no say coming." Did you so testify at the coroner's inquest?

A. I didn't state that I talked with Mr. Sage at the turntable.

Q. This doesn't say so.

A. Wasn't that the first of the reading?

Q. No, it was after leaving the turntable. He says, "We were

talking at the turntable," but this conversation you testified took place in the office.

A. Please read it again.

Q. "Question—You may state to the jury what the conversation was which you had with Mr. Sage. Answer—Mr. Sage came from the roundhouse; we were talking at the turntable, and he goes in the office, and I asked him why he didn't split that train. Question—What did he say to you then? Answer—Just as well not to run a train at all. Question—Did you tell him why you thought the train ought to be divided? Answer—I had no opportunity. I was rebuked. I had no say coming."

226 A. That was my answer.

Q. And that was correct then, was it?

A. We had different conversations about it at different times. I remember that answer.

Q. You had different conversations about what?

A. Concerning this, at different times.

Q. And you talked to him another time about this engine?

A. That same evening.

Q. And where was this other conversation that you had?

A. All held in the office.

Q. And how long was that conversation before or after the one that you testified to at the coroner's inquest?

A. It was before.

Q. That was while Mr. Sage was out at the turntable, was it?

A. No, sir, the conversation was held with Mr. Sage concerning that.

Q. He was superintending the work of cleaning out that turntable that night, wasn't he?

A. Yes, sir.

Q. And that was what he was engaged in just before he came into the office, was it not?

A. I suppose it was.

Q. And you followed him into the office, didn't you?

A. I was in the office.

Q. And then you had the conversation with him with reference to splitting the train?

A. It was in the office, yes, sir.

Q. And it was then that you related to him the reason why you thought this train ought to be split?

A. I mentioned it to him a couple of different times that same evening.

227 Q. Now, you mentioned it to him more than once before; when was the other time?

A. We had argued that question as to splitting the train.

Q. That is not answering my question. You mentioned it to him more than once before, when was the other time?

A. It was practically along near the same time. I am unable to state just the time. It all occurred that same evening.

Q. Who was present at this conversation?

A. I believe my head brakeman was with me at one time.

Q. And what is his name?

A. Henry Dean Palen.

Q. Where is he now?

A. I am unable to say.

Q. Is he in the employ of the Union Pacific?

A. Not to my knowledge.

Q. Do you know whether or not he is in Cheyenne County?

A. Can't tell. I do not know his whereabouts.

Q. Where was he the last time you heard about him?

A. Cheyenne, Wyoming.

Q. Did he say to you the first time you suggested that this train ought to be split that he wouldn't do it?

A. I am unable to say whether it was the first time or not exactly.

Q. Well, what did he say the first time that you talked to him about it?

A. I can't recall just what he did say.

Q. You don't remember what he said the first time you talked to him about splitting this train?

A. There was considerable said, but I don't remember just what he said.

228 Q. Well, can you give us the substance of what he said?

A. No, sir, I cannot.

Q. What did you say to him the first time?

A. I asked him why he didn't split the train.

Q. And is that all you said to him?

A. Oh, no, we had different words, but I can't recall just exactly what was said.

Q. That is the only part of that first conversation that you can remember with reference to splitting the train?

A. I can practically not distinguish any particular conversation or at any particular time, just what occurred.

Q. Well, now, can you tell us what occurred at the second conversation that you had with him with reference to splitting the train?

A. Yes, sir.

Q. What did Mr. Sage say at that conversation?

A. "No damn use of running the damn train."

Q. And what did you say to him at the second conversation?

A. I argued that we couldn't make Potter for water in the storm.

Q. So that it was not in the first conversation when you told him about the condition of the weather, as you related a little while ago?

A. No, sir.

Q. That all took place in the second conversation?

A. His answer as to not running the train was.

Q. Well, how about your ideas of the nature of that storm being expressed there?

A. I expressed my ideas all the way through.

Q. Did you do that in the first conversation?

A. I certainly did. To my best knowledge I did.

229 Q. You remember now that in the first conversation you told him about the severity of the storm?

A. We were talking about it at all conversations held.

Q. Well, do you remember that you told him about it in the first conversation now?

A. Yes, sir.

Q. And didn't he tell you in the first conversation that there was no damn use in running the train then?

A. Not to my knowledge.

Q. What did he say?

A. He stated that the storm was not so severe out in the open as it was here.

Q. And did he say anything else in the first conversation?

A. I am unable to say just what it was.

Q. He led you to believe then that he had been making inquiries with reference to the storm out in the open and had ascertained that it was not as severe there as it was at Sidney?

(Objected to as calling for a conclusion of the witness. Sustained. Exception.)

Q. Well, did he tell you that he would split the train for you then?

A. No, sir.

Q. Now, when did you talk with him a third time with reference to splitting the train?

A. I am unable to say that I talked with him a third time concerning the splitting of the train.

Q. You think you only talked with him twice about that?

A. The best I can remember.

Q. What did you understand from that statement of Mr. Sage, that he didn't think that the train ought to be run that night
230 at all, or that you ought not to split your train?

(Objected to as not proper cross-examination and calling for a conclusion of the witness. Sustained. Exception.)

Q. What is the ordinary running time of a freight train from Sidney to Mile Post 426?

A. About thirty-five or forty minutes.

Q. Isn't it about fifty-five minutes or an hour?

A. Not to Mile Post 426.

Q. On what part of the train did you ride in the trip from Sidney to Mile Post 426?

A. In the caboose.

Q. And did you take occasion to observe the block signals from the caboose that night in the trip?

A. Not the entire distance.

Q. You didn't consider that a part of your duty?

A. The blocks would have been red against me.

Q. They are always red against the conductor?

A. After the engine passes that signal.

Q. And any observance he may make of the signals would not make any difference in the operation of the train; is that correct?

A. I don't understand the question.

Q. Because of the fact that they are always red for the conductor there is no necessity for him observing the block signals?

A. Yes, sir, there is.

Q. Why should he observe the block signals?

A. It is a part of his duty to observe all signals.

Q. What advantage would there be in the conductor observing the block signals?

A. He might see where the engineer would accidentally overlook one.

231 Q. How could he tell whether the engineer had accidentally overlooked one?

A. You couldn't tell that night.

Q. How could he any night?

A. On account of the clearance you could be able to see the signals at a greater distance.

Q. If he could see the signals from the caboose as they appeared ahead of the train, you mean?

A. In nice weather, fair weather.

Q. In nice, clear weather, if he could see the signals before they were reached by the engine of his train, then he could tell whether they were at danger or not?

A. Yes, in nice weather.

Q. But if it were on a night when he couldn't see forty car-lengths, then his observance of the signals would be of no benefit or advantage, would it?

A. I can't see where.

Q. If he couldn't see the signals ahead of the engine on account of the weather conditions, what advantage would it be for him to observe them as his caboose passed them?

A. He could see whether they were lit or not.

Q. That would be the only advantage?

A. Yes, sir.

Q. If they were lit, they would always be red?

A. After the engine had passed them, yes, sir.

Q. You frequently have weather conditions where you cannot see the block signals from the cupola of the caboose in front of the train, have you not?

A. Yes, sir.

Q. As soon as the engine enters the block, the block signal turns red; is that a fact?

232 A. If it is in working condition.

Q. And it stays red until the entire train has passed by that block signal and out of the block at the entrance of which the block signal is stationed?

A. Yes, sir.

Q. Did you observe that night to see if the block signals were lighted or not?

A. Not particularly, no, sir.

Q. What was the condition of the snow that night as to being wet?

A. It was wet.

Q. It was what they call a wet snow?

A. When it first fell, yes, sir.

Q. And when it would fall on the tracks it would melt, would it?

A. No, sir.

Q. What would become of it then?

A. It would freeze.

Q. Freeze and make the track icy?

A. Yes, sir.

Q. How will an engine operate upon an icy track?

A. They are more liable to slip.

Q. Slip a good deal, don't they, on an icy and wet track?

A. Yes, sir.

Q. Wasn't that partly the cause of your train being delayed in proceeding from Sidney to Mile Post 426?

A. It had an effect on it, yes, sir.

Q. The exact extent of that effect you don't know, do you?

A. I do not.

Q. How many tons of freight did you have that night?

A. 1439.

Q. And what was your engine rated at, the capacity?

A. I believe it was 1900 tons.

233 Q. Wasn't it 2000 tons?

A. It might have been.

Q. That means that that engine was capable of pulling 2000 tons?

A. In ordinary weather.

Q. That was a small train, then, ordinarily, for that engine?

(Objected to as not proper cross-examination and argumentative. Sustained. Exception.)

Q. You think that the storm got considerably worse as you proceeded toward Mile Post 426, do you?

A. We received stronger effects of it.

Q. And it was a great deal worse, wasn't it?

A. Yes, sir.

Q. So much so that while you could see a lantern at Sidney three to four car-lengths, at Mile Post 426 you could only see it a half a car-length?

(Objected to as a misstatement of the witness's testimony. Objection withdrawn.)

A. Considering the location of the hills and the buildings, you couldn't have seen a lantern any farther here if it hadn't been for the hills and the buildings.

Q. You think that the hills and the buildings is what made the difference at Sidney?

A. They had an effect on it.

Q. So that persons at Sidney didn't have an opportunity to observe what the conditions of the storm were?

A. They certainly had ought to.

Q. In the yards?

A. Yes, sir.

Q. Did you have any notion that your engine might be getting out of water as you were proceeding from Sidney to Mile Post 426?

234 (Objected to as not proper cross-examination. Sustained. Exception.)

Q. You knew that your engine would be likely to be getting out of water because of the time that it was taking you to go from Sidney to Mile Post 426?

A. Yes, sir.

Q. Now, when you stopped at Mile Post 426, you say that you immediately got off of your train?

A. Yes, sir.

Q. Where was your brakeman at that time?

A. When I got off the train?

Q. Yes.

A. Standing on the platform.

Q. And what did he do?

A. That is where I left him.

Q. Didn't you see to it that he went back to flag his train?

A. I started forward right away.

Q. You didn't pay any attention to whether the brakeman went back to flag your train or not?

A. I would have had to go with him to see that he did.

Q. Did you give him any instructions to go back and flag?

A. We talked about it.

Q. Or are instructions necessary for a brakeman to know that?

A. I was responsible, certainly.

Q. Well, what about the brakeman?

A. The instructions given to my brakeman was that we were liable to be overtaken by Number Seventeen and for him to look out for it.

Q. So you did instruct him that Seventeen was following you and to look out for it?

235 A. I couldn't say as to following me, but I had orders to run ahead of it.

Q. Did he have necessary appliances to go back and protect your train?

A. He had them all there.

Q. He had them all with him out on the platform?

A. Yes, sir.

Q. So that when you stopped he got out ahead of you with all of his appliances for flagging the train?

A. If I remember right, I walked out the door first.

Q. You think now that you were out first?

A. If I remember right.

Q. And did you wait until he followed you out of the caboose?

A. We just stepped out together, him right behind me.

Q. Just as soon as the train stopped, that appeared to be a signal for both of you to get up and get out on the platform?

A. I got out on the platform and just spoke these few words, and stepped off and started ahead.

Q. And then after getting off of the train you proceeded to back up to Mile Post 426?

A. Walked backwards.

Q. Now, when you got up to the head of your train, where was the engineer?

A. I met him right by the side of his tender.

Q. And he told you then that the engine was out of water?

A. Yes, sir.

Q. And asked you to pull the pin so he could disconnect his engine from his train?

A. He told me the situation, and I says, "I will pull the pin."

Q. And after pulling the pin did you go?

A. To the office.

236 Q. You went directly to the office?

A. I climbed in the engine first.

Q. And how long did you remain on the engine?

A. Probably two or three minutes.

Q. And then you went into the office?

A. Yes, sir.

Q. Was it then that you had the conversation with the dispatcher or the operator?

A. What conversation?

Q. Did you have a conversation immediately after you went into the office with the operator?

A. Yes, sir.

Q. What did you say to him?

A. We were talking about the storm.

Q. And did you get any orders there?

A. I just read the orders that were on the desk. I didn't receive any orders, that is, manifold train orders.

Q. You didn't receive any orders at all?

A. Not train orders.

Q. Did you see any orders there that affected the operation of your train?

A. Yes, sir.

Q. What was that order?

A. I can't give the number of the order, but I can repeat the face of it.

Q. Well, repeat.

A. "Extra 504 East will meet Extra 510 West on double track between Sidney and Mile Post 426 instead of at Potter."

Q. Was that all of the orders received there from the dispatcher?

A. It was shortly afterwards there was another order received.

237 Q. Later on you received another order?

A. Very shortly.

Q. And what was that?

A. "Extra 501 East will meet Extra 510 West on double track between Sidney and Mile Post 426 instead of at Potter."

Q. Now, there was nothing said in those two orders that you received about Extra 504 picking up your engine?

A. Not in that order.

Q. When did you receive any order with reference to 504 picking up your engine?

A. When I met the engineer first when I went up to my train.

Q. That was the first notice you had of it?

A. Yes, sir.

Q. The engineer of your train?

A. Yes, sir.

Q. When did 504 arrive with reference to the time that you received the order advising you that Extra 501 East would meet your train on double track between Sidney and Mile Post 426?

(Objected to because the witness has testified that he did not receive such an order. Overruled. Exception.)

A. It was probably about five to eight minutes before Extra 504 arrived, to my best remembrance.

Q. After receiving that order, was it then that you went out to clean out the switch?

(Objected to because the witness has testified that he did not receive the order. Question withdrawn.)

Q. Did you receive that order with reference to where 501 would pass you?

A. I did not.

238 Q. That was an order for your train, was it not?

A. Affecting it.

Q. And it was intended for you?

A. It would have been, yes, sir.

Q. And it was lying there for your crew to read?

A. It was lying there to be delivered to me when I could leave that station.

Q. And you got it?

A. I did not get it. I just read it. It was not delivered to me.

Q. You would not be taking that order after you left that station if 501 was to meet you between Sidney and Mile Post 426, would you?

A. It was not delivered to me at the office.

Q. That kind of an order was not supposed to be delivered to you after you left Mile Post 426?

A. I hadn't left there.

Q. You were supposed to get that order before you left Mile Post 426?

A. Yes, sir.

Q. And that is why you were in that station reading it, isn't it?

A. Yes, sir.

Q. When did you clean out the switch the first time with reference to the time that you got the order that Extra 501 East would meet you on double track between Sidney and Mile Post 426?

(Objected to because the witness has testified that he did not receive the order. Question withdrawn.)

Q. When did you clean out the switch the first time with reference

to the time that you read the order that Extra 501 East would meet you on double track between Sidney and Mile Post 426?

239 A. We first cleaned out the switch before that order was issued.

Q. When did you clean out the switch with reference to the first order you read at Mile Post 426?

A. Almost immediately after reading the order.

Q. So that you didn't receive this second order right away after the first order?

A. Not till after I cleaned the switch for Extra 504.

Q. And how long did it take you to clean that switch?

A. Eight to ten minutes.

Q. And then you went back into the station, did you?

A. Yes, sir.

Q. And how long after you got back in the station did you see this second order that 501 East would meet you between Sidney and Mile Post 426?

A. To my best remembrance, the operator took that order almost immediately after I had returned.

Q. So that if it took you thirty-five minutes to go from your caboose to the station, and you were eight or ten minutes cleaning out the switch, it was at least forty-five minutes from the time your engine stopped at Mile Post 426 before you got the order with reference to passing 501 East between Sidney and Mile Post 426?

A. Near that.

Q. And if you arrived at the station at 3:05 A. M., then you got this second order about 4 A. M.?

A. It must have been about that; near that somewhere. I am not able to say exactly.

Q. What did you do when you got the order that you were to meet Extra 501 East on the double track between Sidney and Mile Post 426?

240 A. I suggested to let 504 go and 501 pick up engine 510.

Q. Well, these orders had nothing to do with what train would pick up 510, did they?

A. Certainly not.

Q. And to whom did you make that suggestion?

A. To the operator.

Q. To the operator in the office?

A. To be delivered to the dispatcher, yes, sir.

Q. Was that when the dispatcher advised you that train 504 would pick up your engine?

A. They advised me that Extra 504 would pick up engine 510 and get out of there.

Q. And did you talk with the dispatcher with reference to that proceeding?

A. No, sir, not afterwards.

Q. The conversation that you had was the conversation with the operator?

A. To be delivered to the dispatcher, which he did.

Q. Now, that conversation was had after you had read the order with reference to where you would meet 501?

A. Yes, sir.

Q. So that that was some time after 4 A. M., that morning?

A. I can't see it that way.

Q. Well, if you got the second order at 4 A. M., how long after was it when you had this conversation with the operator?

A. It was immediately on receiving the order.

Q. Immediately after reading the order?

A. Yes, sir.

Q. Did you examine the engine to ascertain how much water there was in the engine, your engine?

A. No, sir.

241 Q. You didn't have any idea how much water there was left in your engine when you were in the station?

A. No, sir.

Q. You didn't know but what your engine might run out of water almost any moment and freeze up?

A. I did not, no.

Q. Your engine was facing west?

A. Yes, sir.

Q. It would not be practical for an engine from the west to run in on to your track and couple on to your engine, with its pilot coupled on to your pilot, would it?

A. You cannot.

Q. The ordinary way to make that coupling there would be just as you were doing it that night, wouldn't it?

A. Yes, sir.

Q. To uncouple enough cars from the head end of the train so as to leave a sufficient clearance between the point of the switch and the balance of train 504 so that your engine could run in there under its own power and couple on to that other train?

A. Yes, sir.

Q. If your engine had died there because of running out of water that method of picking up engine 510 could not be observed, could it?

A. No, sir.

Q. Your train was on the main westbound track?

A. Yes, sir.

Q. And you had had orders or information that other trains were to follow you?

A. Yes, sir.

242 Q. Particularly Seventeen, a passenger train?

A. Yes, sir.

Q. Did you go back to the rear end of your train to see that your brakeman was performing his duty to protect that passenger train?

A. No, sir.

Q. What time did Mr. Zalesky's train arrive at Mile Post 426?

A. I am unable to say exactly.

Q. Well, what is your best judgment as to when it arrived there?

A. It must have been just about 4 o'clock, or 4:01 or 4:02; right close to that.

Q. When his train arrived, Mr. McManus, his brakeman, got off of the engine and came into the station?

A. Yes, sir.

Q. And were you in there at the time?

A. I was when the engine passed the office.

Q. Were you when McManus came back and went into the station?

A. Just outside.

Q. Who cut off the cars that Zalesky took with him with engine 504 when he pulled east down on the double track?

A. My brakeman, Henry Dean Palen.

Q. Were you not there when that was done?

A. Yes, sir, I was by the office, in that neighborhood.

Q. You were out in front of the office?

A. Yes, sir.

Q. Did you see him cut them off?

A. I couldn't see him.

Q. You don't know how many cars were cut off?

A. He was sent for that purpose.

Q. You don't know how many cars were pulled ahead by engine 504 that were cut off from the balance of the train?

243 A. I am safe in saying two cars, from back of the office.

Q. So you don't want to be understood, as testified in your direct examination, then, that he took off five cars?

A. All told, about five cars.

Q. Well, what do you mean when you say you are safe in saying he took off two cars?

A. That was west of the switch point on the single track.

Q. And you think now that he took off five cars altogether?

A. Yes, sir.

Q. After he had pulled these cars down on to the double track, you then cleaned out the switch for the purpose of throwing it so your engine could proceed westward on to the single track and couple up with the balance of train 504?

A. Yes, sir.

Q. And as you were doing that these cars moved down on you from the west?

A. Yes, sir.

Q. Did you suggest to the dispatcher or operator at any other time that 501 ought to pick up your engine instead of 504?

A. Not that I remember of.

Q. You only made that suggestion once?

A. That is my best remembrance.

Q. And that was before 504 had pulled into the station?

A. Yes, sir.

Q. You are sure about that?

A. Just before they arrived there, I feel satisfied.

Q. I will ask you if you did not testify as follows at the coroner's inquest: "We then waited until 504 arrived. Mr. Zalesky must have seen the station board about the time he was right under it, or his pilot must have been past it, for he was still whistling for the board when the engine passed the office. He got by the
244

office probably three cars when he got his train stopped, and just then Brakeman McManus got off, and as soon as he stopped and came back to the office I met him at the door. I was going out as he was coming in, and I told him the situation. He goes to tell Mr. Zalesky what he had to do; then he comes back and goes in the office and tells the dispatcher. During the meantime my head brakeman had gone up the track about three car-lengths and had cut the train, which was Phillips' train, so as we could get in my engine, and it was then Mr. Zalesky's message was delivered to the dispatcher, and I also suggested to let the second train pick up that engine." Did you so testify at the coroner's inquest?

A. Yes, sir.

Q. Do you know what time it was when the cars moved down upon you from the west, at the time you were cleaning out the switch the second time?

A. No, sir, not exactly.

Q. Do you know what time the wreck occurred?

A. I have a good idea.

Q. And what time?

A. About 4:10, to my best recollection.

Q. When did you hear this squeak with reference to the time that you threw the switch for your train to pass westward?

A. I didn't have the switch thrown.

Q. I will ask you if you testified as follows at the coroner's inquest: "We finally got the switch dug out and thrown properly, and just about the time we got the switch thrown I heard a squeak right by me, and here was the rear part of Mr. Phillips' train almost on top of me."

245 A. I must have, if it is there.

(Mr. Halligan: I object to the question and move to have the question and answer stricken out because it is an unfair statement of the witness's testimony, being "I heard a squeak right by me, and here was the rear part of Mr. Phillips' train almost on top of me as I was on my knees digging out the switch." Overruled. Exception.)

Q. Now, when you heard this train come down upon you, after that you coupled your engine on to that train, did you, for the purpose of pushing it back or ascertaining if it had been broken in two?

A. As soon as I completed the job of cleaning the switch.

Q. Then you went and got your engine and had it come up there to couple on to the balance of this train?

A. Yes, sir.

Q. And you ascertained then that something had happened to that train?

A. Very shortly.

Q. Because you couldn't pump up the air?

A. Yes, sir.

Q. If the air line had not been broken some place in that train, that would have been indicated to the engineer when he attempted

to pump the air, would it? That is, the gauge would show that the air connection was all right?

A. Yes, sir.

Q. Then, when he discovered that it was not all right, you say he gave three blasts of the whistle.

A. Three long blasts of the whistle.

Q. And Zalesky then started to back up his train?

A. The portion he had with him.

246 Q. And then you say that you went up to his train for the purpose of stopping him?

A. Yes, sir.

Q. And who turned the angle cock on that train?

A. Brakeman Henry Dean Palen.

Q. So when you testified that you turned the angle cock, you were mistaken, were you?

A. I approached there to turn the angle cock. I don't think I stated that I turned the angle cock.

Q. Then you don't wish to be understood as saying that now, that you turned the angle cock?

A. I did not turn the angle cock.

Q. Your brakeman had preceded you?

A. Yes, sir.

Q. How long after that was it when you discovered that there had been a wreck?

A. Oh, it was some little time. I got up in my engine and saw the engineer and fireman.

Q. Well, you afterwards learned that the engine of train 501 had run into the caboose of train 504?

A. Yes, sir.

Q. And did you learn that anybody had likely been injured or killed in that collision?

A. At the same time.

Q. Did you go back to the wreck to offer any assistance to the injured?

A. No, sir, I didn't go back.

Q. You went back to Sidney on the first train that west back to Sidney?

A. That was my instructions from the dispatcher.

247 Q. And you staid around there from 4:10 o'clock in the morning until you left for Sidney without going back to the wreckage?

A. Yes, sir.

Q. Your engine was dead at that time?

A. I couldn't say exactly.

Q. Well, didn't you inquire to find out if your engine was dead?

A. I did not.

Q. You had six cars of livestock on your train?

A. Yes, sir.

Q. And yet you made no inquiry to ascertain what the condition of your engine was?

A. My engineer had stated the condition, that he was out of water.

Q. Well, you knew that conditions were such that nothing could be done with your engine?

A. I did.

Q. And that your engine no longer required your attention?

A. Why, it practically required my attention, but I had other instructions from the dispatcher.

Q. There were other men in custody of your engine?

A. There were other men on the train.

Q. When did you receive the instructions from the dispatcher to come into Sidney, with reference to the time when the train left for Sidney?

A. It was some little time before I left for Sidney.

Q. About what time was it that you received those instructions?

A. I am unable to say.

Q. About 6 o'clock in the morning, or 7 o'clock in the morning?

A. No, sir, it was earlier than that, I am satisfied.

Q. Well, give us your best judgment as to when you received the instructions?

248 A. I had got my engine back on to its train and then returned to the office. I don't remember whether I received those instructions before I got Zalesky on his own train or afterwards. It was along about that same time.

Q. It was about the same time that Zalesky got the orders to couple on to his train and pull what he could into Sidney?

A. It was all issued at the same time.

Q. And was that a written order that came?

A. No, sir.

Q. How did that order come?

A. Verbally through the operators from the dispatcher.

Q. By telephone?

A. Yes, sir.

Q. And was there a record made of that order?

A. I don't suppose there was.

Q. You don't know whether there was or not?

A. I do not.

Q. It is customary to make records of all orders?

(Objected to as not proper cross-examination. Sustained. Exception.)

Q. Who was engaged in cleaning out the switch at Mile Post 426 the two times that you say it was cleaned out?

A. Myself and Henry Dean Palen, the brakeman.

Q. Just the two of you?

A. Yes, sir.

Q. And one held the fusee and the other did the work?

A. No, sir.

Q. How did you do it?

A. We both did the work.

Q. Those fusees burned all right, did they in that snow?

A. Yes, sir, they burned.

249 Q. And gave you sufficient light so that you could see how to clean out that switch?

A. No, sir, they did not.

Q. Well, how did you clean out the switch? By feeling it?

A. By feeling and what observations we could get of the track.

Q. Could you see the fusee at all that night burning?

A. Why I had seen them around there. I was carrying one part of the time.

Q. Well, when you didn't have it actually in your hands, could you possible see a fusee burning?

A. Yes, sir.

Q. And about how far away could you see a fusee burning?

A. From a half to probably a car-length.

Q. And you say that you saw the order board at Mile Post 426 when you were eight feet away from it?

A. I didn't see the order board.

Q. Didn't you testify this morning that you could see the order board when you were eight feet away from it?

A. I didn't notice the order board.

Q. Now, how do you wish to be understood; that you did not so testify this morning?

A. I don't remember saying that I saw the order board.

Q. Well, do you want to say that you did not so testify this morning?

A. Yes, sir.

Q. Do you know how many cars Mr. Zalesky had in his train that night?

A. Not from my own observation.

Q. How many cars did you pull into Sidney?

A. Thirty-seven.

250 Q. And thirty-three cars then staid between the mile post order board and the place of the wreck?

A. Thirty-four.

Q. What kind of an engine is 510?

A. A railroad locomotive engine.

Q. What type of engine; Pacific type of engine?

A. I am unable to say.

Q. One of the large engines, is it?

A. A large engine.

Q. And do you know how far an engineer could see an object in the center of the track ahead of your engine from his cab? I mean, on account of his view being obscured by the front of the boiler, how far ahead of the pilot of the engine would an object have to be in the center of the track so it could be observed by the engineer, at any time?

(Objected to as not proper cross-examination and no foundation laid. Overruled. Exception.)

A. In the center of the track?

Q. Yes.

A. I should judge about fifty feet, in clear weather.

Q. Would you be accurate about that, or would you say that it was simply your estimate?

(Objected to as incompetent, irrelevant, immaterial, not proper cross-examination, and too indefinite. Question withdrawn.)

Q. I will say, then, a man standing in the center of the track.

A. About the same distance.

Q. Might it be more than that distance?

(Objected to as not proper cross-examination. Sustained. Exception.)

251 Q. Did you have a lantern with you at the time you were cleaning out the switch the second time?

A. No, sir.

Q. Where was your lantern?

A. It was sitting on the switch ties at the switch.

Q. It was right near you?

A. Close, yes.

Q. Within easy access to you?

A. Yes.

Q. And did you signal your engineer to come ahead when you got the switch set for him for the purpose of coupling on to the rear part of train 504?

A. I tried to.

Q. What did you try to signal him with?

A. A fusee.

Q. Did you try with your lantern at all?

A. The lantern was out. I had discarded that.

Q. Did you try with your brakeman's lantern?

A. It was out.

Q. And on which side of the track did you try to signal him?

A. Both sides.

Q. And then what did you do?

A. Walked to the engine; or first sent my brakeman to the engine.

Q. And then you followed him?

A. I started down that way.

Q. How long after your brakeman went down there was it before you went down?

A. Oh, I was a very short ways behind him.

Q. Did the train start up when your brakeman got down there?

A. Yes, sir, the engine did.

252 Q. The engine started up before you got down there?

A. Yes, sir.

Q. How far had the engine proceeded before you got down there?

A. Probably its own length; maybe a little more.

Q. How far ahead of you was your brakeman?

A. He was just a little ahead of me.

Q. How much?

A. Oh, I am unable to say. It was enough that he had got on the engine and told them to pull ahead and they had started.

Q. Well, he was considerably ahead of you then?

A. Oh, I don't think it was so considerable. He was ahead of me.

Q. An engine or two lengths ahead of you?

A. He was probably a couple engine-lengths ahead of me.

Q. Who were the two operators that were on duty at Mile Post 426 that night?

A. There was only one on duty.

Q. And what was his name?

A. I am unable to give it. I don't know it.

Q. Do you know where he is now?

A. No, sir.

Q. Do you know whether he is still in the employ of the Union Pacific?

A. I do not.

Q. Who was your rear brakeman that night?

A. Chauncey L. Sweet.

Q. And do you know where he is?

A. Not at the present time.

Q. Do you know whether he is in the employ of the Union Pacific at the present time?

A. He was yesterday.

253 Q. Which light is the more plainly discernible, a red light or a green light, at night?

A. I believe a green light.

Q. You think you can see a green light better than you can a red light?

A. I think on an average.

Q. Well, how about when it is snowing some?

A. Oh, you couldn't see either of them.

Q. Well, when it is not snowing so bad?

A. I believe your eye would catch a green light a little quicker.

Q. And how long have you railroaded?

A. Eleven years; that is, in the block signal.

Q. Do you think they would make the red light the danger light if you could see the green light better?

A. They are supposed to be about the same, but I believe your eye will catch a green light a little quicker.

Q. But do you think they would make the red light the danger light, instead of the green light, if you could see the green light easier?

(Objected to as argumentative and not proper cross-examination. Sustained. Exception.)

Q. It was not so awful cold that night, was it?

A. It was in the morning; turned quite cold.

Q. I mean at the time of the wreck.

A. No, not so awful cold; freezing, however.

Q. Your deposition was taken in this case at Cheyenne, was it not?

A. Yes, sir.

Q. I will ask you if in that deposition you did not testify as follows: "Question—When you stopped train 510 West at Mile Post 426, did you send out the head brakeman ahead? Answer—No, sir. Question—Did you send out the flagman. Answer—He

254 was standing on the platform when I left the caboose. Ques-

tion—Do you know whether or not he went out or attempted to go out? Answer—He did not."

(Objected to as incompetent and not tending to impeach the witness on any testimony given here on the witness stand, and if for impeachment purposes it is on an immaterial point. Sustained. Exception.)

Redirect by Mr. Halligan:

Q. Mr. McConaughy, Mr. Ellick asked you if you did not testify before the coroner's inquest as follows: "We could dig it out, which caused considerable delay, but we finally got the switch dug out and thrown properly, and just about the time we got the switch throwed I heard a squeak right by me, and here was the rear part of Mr. Phillips' train almost on top of me." Now, I will ask you if that answer that Mr. Ellick asked you if you gave at the coroner's inquest was not a part of the answer which you gave to the following question: "You may state to the jury just what was done in the way of attaching this engine 510 to train 504, in your own language." And was not the entire answer which you gave to that question as follows:

(Mr. Ellick: I object to counsel reading the entire answer to that question as incompetent, irrelevant, immaterial, not proper redirect examination, and an attempt on his part to prove certain facts by the testimony of the witness given at the coroner's inquest when the witness is present in the court room and on the stand, and for the further reason that it assumes a fact not in evidence.

Mr. Halligan: What fact is assumed which is not in evidence?

Mr. Ellick: That I asked the witness the question which you say in that question I did ask him.

By the Court: The objection is sustained.)

Q. I will ask you if the full answer that you gave before the coroner's inquest with reference to the facts which Mr. Ellick asked you was not as follows: "We could dig it out, which caused considerable delay, but we finally got the switch dug out and thrown properly, and just about the time we got the switch throwed I heard a squeak right by me, and here was the rear of Mr. Phillips' train almost on top of me, as I was on my knees digging out the switch."

A. I must have stated that, but I couldn't throw the switch while on my knees.

Q. What I ask you is if that was not your testimony before the coroner's jury.

A. Yes, sir, I believe it was, to my best remembrance.

Q. When you receive a train order, when a conductor receives a train order, does he receipt for the order?

A. No, sir.

Q. A written order, does he receipt for a written order?

A. No, sir.

Q. When does he receive the train order with reference to the time he departs from a station?

A. Before he departs.

Q. And how soon?

256 A. Oh, at different times.

Q. When were you authorized to receive that order, when could you receive it, the order that you read for you at Mile Post 426?

A. When I had an opportunity to proceed.

Q. Now, there is one question I didn't ask you on direct, and that is, how long had 504 East been at Mile Post 426 before the train backed down on you as you were cleaning out the switch? About how long?

A. Eight to ten minutes, to my best recollection.

Q. On cross-examination you stated that your lantern was out while you were cleaning out the switch. Is that correct? The light had gone out?

A. Yes, sir.

Q. When did it go out?

A. At different times. It had been relit at different times.

Q. Had you relit it a number of times that night?

A. Yes, sir.

Q. After arriving at Mile Post 426?

A. Yes, sir.

Q. Could you state how many times you relit your lantern?

A. I cannot.

Q. Did you state that your brakeman's lantern was also out?

A. Yes, sir.

Q. What caused the lanterns to go out?

A. The snow would pack around them and smother them.

Q. The storm, was it?

A. Yes, sir.

Q. Did you leave the caboose with a lantern that was lit?

A. I started with it.

257 Q. How far did you get with it before it went out?

A. I am unable to say.

Q. Was it lit when you arrived at the head end of the train?

A. Not when I crawled in the engine.

Q. When did you arrive in Sidney the next morning?

A. Somewhere about 7 o'clock.

Q. And what was the condition of the storm then in Sidney with reference to what it was at Mile Post 426 at the time of the collision?

(Objected to as incompetent, irrelevant, and immaterial. Sustained. Exception.)

Q. Again calling your attention to Plaintiff's Exhibit B, and to Rule 972, I will ask you if that rule was in force on the 13th and 14th days of March, 1913.

A. Yes, sir.

(Plaintiff offers Rule 972 in evidence. Objected to as incompetent, irrelevant, and immaterial, not tending to prove any of the issues

in this case, and no sufficient foundation laid for the introduction of the rule in evidence for the reason that the testimony does not show that any of the operators or dispatchers were advised of the condition of this storm a sufficient time ahead of the wreck to have prevented it, if it could have been prevented. Overruled. Exception. Read to the jury by Mr. Halligan, as follows: "972. Operators will advise the superintendent promptly as to the severity of all storms and extent of damage. When there are indications of heavy winds, 258 cloudbursts, or abnormal weather conditions, they must see at once that cars at their stations are so secured that they will not move and obstruct main line.")

Q. Mr. McConaughy, you may state from your experience as a railroad man and your experience as a conductor what would have been the proper way to have operated trains 501 and 504 between, we will say, Dix and Mile Post 426 or Sidney, with reference to 501 following 504.

(Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and calling for the opinion and conclusion of the witness upon a subject that is not a matter of expert testimony. Sustained. Exception.)

(Plaintiff offers to prove by the witness that the proper and right method of operating trains 504 and 501 between the points stated in the question was to not have permitted 501 to follow 504 until 504 had cleared and gone by the next telegraph station ahead of 501; in other words, not to have permitted 501 to leave Potter until after 504 had gone by Mile Post 426.

Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and calling for the opinion and conclusion of the witness upon a subject that is not a matter of expert testimony. Offer denied. Plaintiff excepts.)

(The defendant now moves the court to strike out of the testimony of this witness all of his evidence with reference to an alleged 259 conversation between him and the operator at Mile Post 426 concerning the condition of the weather, for the reason that the same is incompetent, irrelevant, and immaterial, and does not tend to prove any of the issues in this case or any of the acts of negligence charged in this case, and for the further reason that the evidence of this witness shows that if that conversation was had with the operator it was had at a time when it was too late for the defendant company to have stopped train 501 at Potter, Nebraska, or to have prevented the wreck. Overruled. Defendant excepts.)

(The defendant moves the court to strike out of the testimony of this witness all of his testimony with reference to the conversation had between the operator at Mile Post 426 and the dispatcher at Sidney, Nebraska, for the reason that it is incompetent, irrelevant, and immaterial, and does not tend to prove any of the issues in this case or any of the acts of negligence charged in this case, and for the further reason that the evidence of this witness shows that if that conversation was had it was had at a time when it was too late for the

defendant company to have stopped train 501 at Potter, Nebraska, or to have prevented the wreck. Overruled. Defendant excepts.)

(The defendant at this time moves the court to strike from the evidence of this witness all of his testimony with reference to an
260 alleged conversation which the witness claims to have had with the dispatcher of defendant company at Mile Post 426, immediately before the wreck, concerning the condition of the weather, for the reason that it is incompetent, irrelevant, and immaterial, and does not tend to prove any of the issues in this case or any of the acts of negligence charged in this case, and for the further reason that the evidence of this witness shows that if that conversation was had it was had at a time when it was too late for the defendant company to have stopped train 501 at Potter, Nebraska, or to have prevented the wreck. Overruled. Defendant excepts.)

Recross-examination by Mr. Ellick:

Q. As the snow was accumulating on your face it was possible to brush that snow away, wasn't it, so that it would not freeze on your face?

A. We did, yes, sir.

Q. How long has it been since you were in the service of the Union Pacific?

A. About six months.

Q. Did you leave the service voluntarily or were you discharged?

A. Discharged.

Q. For a violation of the rule with reference to flagging trains?

A. That is what my service letter states.

261 Redirect by Mr. Halligan:

Q. What were you discharged for?

A. Telling the facts at the coroner's inquest.

Q. Was that in the service letter?

A. No, sir.

Q. What was the rule in the service letter?

A. Improper flagging; Rule 99.

Recross-examination by Mr. Ellick:

Q. You admitted it as a fact, didn't you, at the inquiry that was given you, that you had failed to flag your train in the manner required by the rules?

A. Yes, sir.

Q. So it was a fact that you had failed to flag?

A. We had.

Q. And that was the fact that was recited in that service letter?

A. Yes, sir.

Redirect by Mr. Halligan:

Q. Was anyone else discharged at the time you were?

A. Yes, sir.

(Witness excused.)

262 Mrs. EDITH CRADIT, called as a witness on behalf of the plaintiff, and duly sworn, testified as follows:

Direct examination by Mr. Halligan:

Q. Give your name to the reporter.

A. Mrs. Edith Cradit.

Q. Where do you reside?

A. Sidney, Nebraska.

Q. And was Charles M. Cradit your husband in his lifetime?

A. Yes, sir.

Q. When did he die? What was the date of his death?

A. On the morning of March——

Q. Last March, was it.

A. Friday morning, or March the 14th.

Q. What year?

A. 1913.

Q. How old was he at the time of his death?

A. Thirty-one.

Q. When was his 31st birthday?

A. The 9th of December.

Q. Of what year?

A. 1912.

Q. He was just past 31?

A. Yes.

Q. Did you and he have any children?

A. Two children.

Q. What is the name and the age of the oldest child?

A. Violet Bernita Cradit; five years old.

Q. When was she born?

A. She was born in 1907.

263 Q. Do you remember the day of the month?

A. The 25th day of May, 1907.

Q. What is the name and the age of the youngest child?

A. Grace Edith Cradit; age two years.

Q. When was she born?

A. The 30th day of December, two years ago.

Q. The 30th day of last December she was two years old?

A. Yes.

Q. Were those all of the children of you and Mr. Cradit?

A. Yes, sir.

Q. I will ask you to state what was the condition of Mr. Cradit's health.

A. He was healthy and well.

Q. He was a healthy, well man, was he?

A. Yes, as well as ever he was.

Q. And what were his habits with reference to being industrious or otherwise?

(Objected to as incompetent and immaterial. Overruled. Exception.)

A. Of good habits.

Q. What was his business?

A. Railroadng.

Q. How long had he been railroadng?

A. Well, I couldn't say for sure; three or four years, I guess.

Q. And how much of the time did he work at the business?

A. Most of the time.

Q. All of the time that he could get to work?

A. Yes, only when he took his lay-off.

Q. How much did he earn working at that? Do you know how much?

A. On an average of \$85 to \$100 a month?

264 (Defendant moves to strike out the answer as not responsive. Sustained. Exception.)

Q. I asked you if you know. Now do you know what your husband earned a month as railroad brakeman?

A. Yes.

Q. Now I will ask you how much he did earn a month.

A. From \$85.00 to \$100.00 on an average.

Q. What length of time did it take him to earn \$85 or \$100.00?

A. Each month.

Q. What did he do with the money that he earned?

A. Took care of his family with it.

Q. Now, who were yourself and your children dependent upon for your support?

A. My husband.

Q. Did you have any other means except your husband?

A. No, sir.

Q. Where did you and your husband reside at the time of your husband's death?

A. At Sidney, Nebraska.

Cross-examination by Mr. Ellick:

Q. Who paid the bills of the living expenses, Mrs. Cradit?

A. My husband and I together.

Q. The two of you together?

A. Yes, sir.

Q. Sometimes he would pay them and sometimes you would?

A. Yes, when he was called away I had to pay them.

Q. He had no arrangement with you whereby you were on an allowance of any amount for the operation of the house?

265 A. Yes, he always allowed me my expenses for the living expenses.

Q. And was that a definite and certain amount that he allowed you each month for the house?

A. Yes, he allowed me five dollars.

Q. Five dollars how often?

A. Five dollars each month.

Q. Do you mean for the household expenses?

A. No, not the household expenses; my little necessities.

Q. That was to take care of your clothing and your incidentals?

A. Yes, little things.

Q. And the expenses for the home, the groceries and clothing for the children, how much did he provide you with for that?

A. Why, he paid it, that's all, whatever it was.

Q. He paid the bills at the stores? You kept charge accounts at the different stores?

A. Yes.

Q. And you haven't any idea what they amounted to?

A. Yes, our grocery bill was on an average of \$15.00 a month and over, at home.

Q. And what was your meat bill?

A. We didn't have much of a meat bill at home.

Q. And what was your other expenses?

A. The milk bill and such like. Well, that would include that \$5.00 that I was speaking of.

Q. The \$5.00 would cover your lights and the milk, and then there was \$15.00 for the groceries, and how much for the clothing?

A. Oh, \$12.00 or \$15.00.

Q. Twelve or fifteen dollars a month?

A. Yes.

266 Q. And did you have any other expenses?

A. His expenses at the other end of the line.

Q. That took a portion of his salary, did it?

A. Yes, bound to.

Q. And about what portion of his salary did that take?

A. Well, from \$15.00, I suppose, to \$18.00 a month.

Q. And did you have any other expenses besides these that you have named now?

A. Our rent.

Q. What did the rent amount to?

A. Thirteen dollars a month.

Q. And is that all of the money that he furnished for the house?

A. Oh, we had doctor bills occasionally.

Q. Well, what would that amount to?

A. Why, \$5.00 maybe; five or ten.

Q. How long had he been employed by the railroad company the last time he was in its employ?

A. I think over three years.

Q. Was there any intermission in his employment during that time?

A. He had his lay-off, to take a trip, was all.

Q. And was there a time here when he was employed in Sidney?

A. In the yard?

Q. No, as driver and teamster?

A. Yes.

Q. How long ago was that?

A. That was before we were married.

Q. When he was in Sidney, that money that was expended for the household expenses was partly for his support?

A. While at home, of course. He was here part of the time.

267 Redirect by Mr. Halligan:

Q. Mrs. Cradit, how long were you married to your husband at the time of his death?

A. Six years then.

Q. And what were his habits with regard to sobriety?

(Objected to as incompetent, irrelevant, immaterial, and repetition. Sustained. Exception.)

Q. Now, you say he would give you \$5.00 a month out of his wages. Was that for what you women call pin money, the little things you needed?

A. Yes, partly.

Q. Well, what did you do with this \$5.00 that he would give you? What would you spend it for ordinarily?

A. For the household necessities.

Q. I will ask you what your husband did with that part of his salary that was left after he paid his own expenses and the family expenses, if there was anything left?

A. There was never much left. It took it all to live at both ends of the road.

Q. He spent it on the family necessities and his own expenses, did he?

(Objected to as leading and suggestive. Sustained. Exception.)

Q. You haven't enumerated all of the family expenses, have you, in answer to Mr. Ellick's question? You haven't told about all of your family expenses, have you? There were others?

(Objected to as leading. Overruled. Exception.)

A. Yes, sir, there were plenty of expenses.

Q. You had to burn coal?

A. Yes, and fuel and lights.

268 Recross-examination by Mr. Ellick:

Q. What was the condition of Mr. Cradit's eye-sight and hearing?

A. Good, so far as I know.

Q. And his entire earnings was what he earned from the Union Pacific during the last three years that he worked for them, was it?

A. Yes, sir.

(Witness excused.)

(Plaintiff offers in evidence the Carlisle Tables as found in Cobbey's Annotated Statutes of Nebraska for 1911, at the conclusion of Section 6468 of that statute, so far as that pertains to a person of the age of thirty-one years. Objected to as incompetent, irrelevant, and immaterial, and no sufficient foundation laid. Overruled. Defendant excepts. Read to jury by Mr. Halligan, as follows: "For a person at thirty-one, under the Carlisle Tables, the expectancy is 33 68/100 years.")

269 SWAN DEDRICK, called as a witness on behalf of the plaintiff, and duly sworn, testified as follows:

Direct examination by Mr. Devoe:

Q. Give your name to the reporter.

A. Swan Dedrick.

Q. Where do you reside, Mr. Dedrick?

A. Sidney, Nebraska.

Q. How long have you resided in Sidney, Nebraska?

A. Oh, I have been here over thirty years.

Q. What is your occupation?

A. At the present time I am running a cigar and candy store.

Q. What was your occupation on the 13th and 14th days of March, 1913?

A. Hotel.

Q. Where was your hotel situated?

A. The Metropolitan hotel, situated right across from the depot on Front street.

Q. In Sidney?

A. In Sidney.

Q. Where is the entrance to your hotel?

A. On the north.

Q. Where were you on the night of March 13th and the day of March 14th, 1913?

A. I was there in the hotel.

Q. In Sidney?

A. Yes, sir.

Q. You may state to the jury what the condition of the weather was on the night of March 13th and the day of March 14th, 1913.

270 (Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and not tending to prove any issues or act of negligence charged in the petition. Sustained. Exception.)

Q. Where were you at about 4 o'clock in the morning of March 14, 1913?

A. I was in the hotel in Sidney.

Q. Were you up or were you asleep at that time?

A. I was up, in the office.

Q. Did you at that time have an opportunity to observe the condition of the weather at that time?

A. Yes, sir.

Q. You may state what the conditions of the weather were at that time.

(Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and not tending to prove or disprove any of the issues in this case or any particular acts of negligence charged in the petition. Sustained. Exception.)

Q. At about 4 o'clock in the morning of March 14th, 1913, were you out in the storm?

A. No, sir.

Q. Was the door of your hotel open and were you in a position where you could see what the conditions of the weather were at about four o'clock on the morning of March 14, 1913?

A. Yes, sir.

Q. You may now state what the condition of the weather was.

(Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and not tending to prove or disprove any of the issues in this case or any particular acts of negligence charged in the petition. Question withdrawn.)

Q. You may state whether or not you did observe the conditions of the weather at that time.

A. Yes, sir.

Q. Now you may state what the conditions of the weather were at that time.

(Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and not tending to prove or disprove any of the issues in this case or any particular acts of negligence charged in the petition. Overruled. Exception.)

A. It was bad. We had a storm, a very bad storm.

(Defendant moves to strike out the answer as a conclusion of the witness. Sustained. Exception.)

Q. You may state whether or not the wind was blowing at that time.

A. Yes, sir, the wind was blowing.

Q. You may state whether or not you know about what the velocity of that wind was at that time.

A. No, I couldn't.

Q. You may state whether or not it was snowing at that time.

A. Yes, sir, it was.

Q. What was the condition of the air with reference to the quantity of snow?

(Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and not tending to prove or disprove any of the issues in this case or any particular acts of negligence charged in the petition. Overruled. Exception.)

A. Well, it was cold.

(Defendant moves to strike out the answer as not responsive. Sustained. Exception.)

Q. What was the condition of the air with reference to the quantity of snow?

A. Well, it was stormy; snowing and blowing.

(Defendant moves to strike out that part of the answer, "it was snowing and blowing," as not responsive. Overruled. Exception.)

Q. How was it snowing?

(Objected to as calling for a conclusion of the witness. Overruled. Exception.)

A. (No answer.)

Q. To what extent was it snowing?

A. Snowing very hard.

(Defendant moves to strike out the answer as a conclusion of the witness. Overruled. Exception.)

Q. At that time you may state what the condition of the ground was, the sidewalk in front of your hotel, with reference to snow.

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove any of the issues in this case or any of the acts of negligence charged in the petition, and not directed to the point where the wreck occurred. Overruled. Exception.)

A. All covered with snow.

Q. Which way was the wind blowing that night, Mr. Dedrick?

A. Blowing from the west; a little northwest.

Q. During the thirty years that you have resided in Cheyenne county, you may state how this storm compared with other storms that you have observed here in Cheyenne county.

273 (Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, assuming a fact not proven, and not tending to prove any of the issues in this case. Overruled. Exception.)

A. Oh, it was about as bad a storm as I ever saw.

Q. During the time that you have resided here, have you ever witnessed or observed a storm as severe as this one which was raging on the 13th and 14th of March, 1914?

(Objected to for the same reasons as stated to the preceding question, and for the further reason that it has already been answered by the witness. Overruled. Exception.)

A. Well, no, I haven't seen any worse storm than that.

Q. Have you ever seen or witnessed a storm that was equal in severity to this storm?

(Same objection as to the preceding question. Overruled. Exception.)

A. I have seen them where they lasted longer than this, but not so severe.

Q. By what name are these storms known, Mr. Dedrick?

(Objected to as immaterial. Overruled. Exception.)

A. Blizzards we call them.

Q. Did you observe the condition of the weather after four o'clock in the morning of March 14, 1913?

A. Yes, I was up all night.

Q. What was the condition of the storm at about five o'clock in the morning of March 14th?

(Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and not tending to prove any of the issues in this case. Overruled. Exception.)

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A. Well, I didn't think it was any better.

Q. About the same at five o'clock as it was at four o'clock?

(Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and not tending to prove any of the issues in this case. Overruled. Exception.)

A. Yes.

Q. Did you observe the conditions of the weather at any later time than five o'clock in the morning of March 14th?

A. Yes, I was up until eight or nine o'clock.

Q. What was the condition of the weather at 5:30 o'clock in the morning of March 14th?

(Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and not tending to prove any of the issues in this case. Overruled. Exception.)

A. Well, about daylight it commenced to get a little better.

Q. About what time was that?

A. Oh, it was six o'clock or after.

Q. What was the condition of the weather between six and seven o'clock on the morning of March 14, 1913?

(Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and not tending to prove any of the issues in this case. Sustained. Exception.)

Q. When did this storm commence, Mr. Dedrick?

A. Well, as near as I remember, it commenced in the evening.

Q. Of what day?

A. I don't remember the date. I couldn't say the date.

275 Q. Was it the evening before the wreck occurred at Mile Post 426 on the Union Pacific railroad?

(Objected to as leading and suggestive. Overruled. Exception.)

A. Yes, it was in the evening before that.

Q. How long did this storm continue?

A. It continued all night.

Q. How long was it, Mr. Dedrick, after this storm commenced that it became most severe?

(Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, not tending to prove any of the issues in this case, and too general. Overruled. Exception.)

A. Well, I think about two o'clock was the worst of it.

Q. How long did the storm continue?

A. It lasted all night.

Q. Did it continue any longer than that night?

A. Well, the worst of it. It let up in the morning a little.

Q. Was it still storming on the next day?

A. Oh, yes.

Q. Did it storm all that day?

(Objected to as immaterial. Sustained. Exception.)

Cross-examination by Mr. Ellick:

Q. You were making the observations of this storm from the warm apartments of your hotel office, were you, Mr. Dedrick?

A. Yes, sir.

Q. Where the wind and snow was whirling and swirling around the buildings there on the corner?

276 A. Yes. I wasn't out in it.

(Witness excused.)

(Defendant moves to strike out all of the testimony of the witness with reference to the storm as incompetent, irrelevant, immaterial, no sufficient foundation laid, and not tending to prove any of the issues in this case, the witness having said that he was not out in the storm, but only observed it from the inside of his hotel. Overruled. Exception.)

CHARLES M. HADLEY, called as a witness on behalf of the plaintiff, and duly sworn, testified as follows:

Direct examination by Mr. Halligan:

Q. What is your name?

A. Charles M. Hadley.

Q. Are you the Charles M. Hadley who was appointed administrator of the estate of Charles M. Cradit?

A. I am.

Q. Are you still the administrator of that estate?

A. Yes, sir.

Q. And for and on whose behalf did you bring this lawsuit?

A. On behalf of Mrs. Cradit and her two children.

(Witness excused.)

277 J. J. McCONAUGHY, recalled as a witness on behalf of the plaintiff, testified as follows:

Redirect examination by Mr. Halligan:

Q. Mr. McConaughy, in your testimony yesterday you stated that you told the operator at Mile Post 426 to tell the dispatcher that it was storming so bad you couldn't see anything, and to allow 504 to proceed to Sidney and have 501 pick up engine 510. I will ask you to state how the operator at Mile Post 426 transmitted that message to the dispatcher; what you saw him do. That is, was it done by telephone or telegraph?

(Objected to as incompetent, irrelevant, and immaterial, and assuming a fact that is not in evidence in this case, and for the further

reason that that was all gone over in detail in the examination in chief of this witness. Overruled. Exception.)

Q. Did you hear what the operator talked through the telephone?

A. Yes, sir.

Q. What did the operator say through the telephone?

(Objected to as repetition. Overruled. Exception.)

A. He says: "McCon."—that is what I went by on the road for short—"says to let Extra 501 pick up engine 510, and let Extra 504 go"; that it was storming so bad we couldn't see. I stood right by the agent when he transmitted that.

Q. How long after he transmitted that did the answer come back?

A. Immediately.

Q. What did he tell you about that then?

A. He said: "The dispatcher says for Extra 504 to pick up engine 510 and get out of there."

278 Cross-examination by Mr. Ellick:

Q. There is one question that I neglected to ask yesterday, and I want to ask it now. When your brakeman, or yourself, whoever it was, went back to your engine at Mile Post 426, after cleaning out the switch so that your engine could proceed westward on to the single track and couple on to 504, the engine in response to that communication moved forward, did it not?

A. Yes, sir.

Q. Where were you when the engine got near the east end of that string of cars?

A. Right by the pilot.

Q. Was the engineer stopped when he got near the string of cars by anybody, by any signal?

A. No, sir.

Q. Nobody gave him a signal to stop his train?

A. I gave a signal when he coupled on.

Q. What kind of a signal did you give?

A. A stop signal.

Q. With your lantern?

A. With a red fusee.

Q. And where did you do that?

A. Right by the pilot.

Q. And on which side of the engine?

A. The north side; the right-hand side or engineer's side.

Q. And he stopped, did he?

A. He sure did when he struck the cars.

Q. Well, he stopped in response to that signal, didn't he?

A. No, sir.

Q. He stopped right after you gave the signal, did he not?

279 A. He stopped when he coupled on to the cars.

Q. Well, you gave him the signal when he coupled on to the cars?

A. I certainly did.

Q. And he stopped right after that?

A. He didn't stop, I don't think, for my signal.

Q. Well, you don't know whether he saw your signal or not?

A. I am satisfied he didn't.

Q. Well, you don't know?

A. I have got a very good idea.

Q. Well, that is nothing but your guess-work?

A. Oh, I don't know. It was practical work that I was in.

Q. All you know about that is just a guess that you are making as to whether he saw it or not?

A. Well, I am satisfied he didn't see my signal.

Q. And that is all you know about it, is from the guess that you are making?

A. I am satisfied.

Q. Not from any knowledge of what he saw?

A. He never told me that he saw it.

(Witness excused.)

Plaintiff rests.

280 (Comes now the defendant, at the close of the testimony offered by the plaintiff, and moves the Court to dismiss the action of the plaintiff herein for the following reasons:

1. The petition does not state facts sufficient to constitute a cause of action.

2. The evidence adduced by the plaintiff is not sufficient to sustain a cause of action against this defendant.

3. The evidence as adduced by the plaintiff shows that the death of Charles M. Cradit was due solely and exclusively to his own carelessness and negligence.

4. The evidence of the plaintiff shows that the death of the said Charles M. Cradit resulted from dangers and risks which the said Charles M. Cradit had assumed.

5. For the reason that the evidence of the plaintiff shows that the death of the said Charles M. Cradit was due solely and exclusively to dangers and risks which the said Charles M. Cradit is shown by the evidence to have assumed.

6. That the evidence of the plaintiff fails to sustain or support the allegations of negligence set forth in plaintiff's petition.

Motion overruled. Defendant excepts.)

281 (The defendant, at the close of plaintiff's testimony, now moves the Court to instruct the jury to return a verdict in favor of the defendant and dismiss plaintiff's action for the following reasons:

1. The petition does not state facts sufficient to constitute a cause of action.

2. The evidence adduced by the plaintiff is not sufficient to sustain a cause of action against this defendant.

3. The evidence as adduced by the plaintiff shows that the death

of Charles M. Cradit was due solely and exclusively to his own carelessness and negligence.

4. The evidence of the plaintiff shows that the death of the said Charles M. Cradit resulted from dangers and risks which the said Charles M. Cradit had assumed.

5. For the reason that the evidence of the plaintiff shows that the death of the said Charles M. Cradit was due solely and exclusively to dangers and risks which the said Charles M. Cradit is shown by the evidence to have assumed.

6. That the evidence of the plaintiff fails to sustain or support the allegations of negligence set forth in plaintiff's petition.

Motion overruled. Defendant excepts.)

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Defendant's Evidence.

JAMES ZALESKY, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. State your name.

A. James Zalesky.

Q. Where do you reside, Mr. Zalesky?

A. Cheyenne, Wyoming.

Q. What is your occupation?

A. Locomotive engineer.

Q. How long have you been a locomotive engineer?

A. About six years.

Q. And by whom have you been employed during that six years?

A. The Union Pacific Railroad Company.

Q. What was your occupation prior to the time that you became a locomotive engineer?

A. Fireman.

Q. Locomotive fireman?

A. Yes, sir.

Q. How long were you a locomotive fireman?

A. About four years.

Q. And were you connected with the railroad business before that time, before you were a fireman?

A. Yes, sir.

Q. In what capacity?

A. Section hand.

283 Q. By what company are you employed at the present time?

A. The Union Pacific.

Q. On what district are you employed?

A. Fourth District, Nebraska Division.

Q. Running from Sidney, Nebraska, to Cheyenne, Wyoming?

A. Yes, sir.

Q. Were you in the employ of the Union Pacific on that division on March 13th and 14th, 1913?

A. Yes, sir.

Q. You are the James Zalesky who is referred to as being the engineer of train Extra 504 East that was operating between Cheyenne and Sidney, Nebraska, on the night of March 13th and 14th, 1913?

A. Yes, sir.

Q. What time did your train arrive at Dix, Nebraska, on that trip?

A. As near as I could remember, it was 12:05, or somewhere between 12 o'clock and 12:05.

Q. On what date?

A. On the 14th day of March, 1913.

Q. And what time did your train leave Dix on that night?

A. Left Dix at 2:35 A. M. on the same day.

Q. While you were at Dix, did you see train Extra 501 East?

A. Yes, sir, I did.

Q. As I understand it, there is an eastbound main track at Dix?

A. Yes, sir.

Q. And a westbound main track at Dix?

A. Yes, sir.

Q. And a siding located between those two tracks?

A. Yes, sir.

Q. When you pulled into Dix, on what track did you pull your train?

284 A. On the sidetrack between the two main lines.

Q. On what track did you see Extra 501 East?

A. On the east main track.

Q. And what direction was that from your train?

A. South.

Q. Was the engine of Extra 501 East and your engine near each other as you stood on those tracks?

A. Yes, sir.

Q. State the relative position of those two engines.

A. My engine stood with the pilot just about at the rear end of engine 501's tank.

Q. The tank is that part of the engine that is back of the gangway that goes up into the cab of the engine, is it?

A. Yes, sir.

Q. How near to the east switch, that is, the first switch from the sidetrack, was the pilot of your engine as you stood there that night?

A. From the first switch?

Q. Yes.

A. About an engine length.

Q. And about how many feet would that be?

A. About eighty feet.

Q. And there is a second switch there, is there, from this sidetrack up on the main line?

A. Yes, sir.

Q. In order to get from the passing track on to the main line at the east end of the passing track or sidetrack, it is necessary to pass two switches, is it?

A. Yes, sir.

Q. One switch at the east end of the sidetrack?

A. Yes, sir.

285 Q. And the other switch on the main eastbound track?

A. Yes, sir.

Q. How far was your engine from the second switch east of you, namely, the switch on the main eastbound track?

A. Well, it would be the distance between the two switches.

Q. And about what is that distance?

A. Well, I judge it about 100 feet.

Q. So that you were about 180 feet from the second switch, that is, the pilot of your engine?

A. Yes, sir.

Q. Were you on your engine when the parties referred to in the testimony here were cleaning out the second switch prior to leaving Dix?

A. Yes, sir, I was.

Q. Could you see the burning fuses that they were using at that switch at that time from your engine?

A. Yes, sir.

Q. You say you left Dix about 2:35 A. M. on the morning of the 14th?

A. Yes, sir.

Q. And proceeded from there to Potter?

A. Yes, sir.

Q. What time did you arrived at Potter?

A. As near as I could remember, it was about 3:05 A. M.

Q. Did you observe the block signals that governed the movement of your train between Dix and Potter?

A. Yes, sir.

Q. Did you see them?

A. Yes, sir.

Q. What was done by your engine at Potter?

A. Stopped and took water.

286 Q. And what time did you leave Potter?

A. I left Potter about 3:15 A. M.

Q. And proceeded from there to what point?

A. To Mile Post 426.

Q. And about what time did you arrive at Mile Post 426?

A. About 3:35 or :40 A. M.

Q. Did you observe the block signals between Potter and Mile Post 426 that governed the movement of your train?

A. Yes, sir.

Q. And you saw them?

A. Yes, sir.

Q. What lights were displayed upon the block signals that your train passed that governed the movement of your train between Dix and Mile Post 426?

A. Green.

Q. And that indicated that the block ahead was clear and to proceed?

A. That the track ahead was clear.

Q. What is the fact as to whether or not a green light or a red light is more plainly discernible in any snow storm?

A. A red light.

Q. Did you stop at Mile Post 426?

A. I did.

Q. And when you stopped, what did you do with reference to whistling out a flag or not?

A. Yes, sir, I whistled out a flag.

Q. And what is that signal?

A. That is a signal for a flagman to go back and protect the rear end of his train.

Q. And how do you give that signal?

A. One long and three short blasts of the steam whistle.

287 Q. That is an indication to the flagman that you intend to stop there some time?

A. That we will be delayed at that point.

Cross-examination by Mr. Halligan:

Q. You testified before the coroner's inquest here, did you not, Mr. Zalesky?

A. Yes, sir, I did.

Q. I will ask you at that examination if you were not asked this question and did you not make this answer: "Question—When did you arrive at Potter? Answer—As near as I can remember, 3:05. I wouldn't swear to it."

A. Well, I suppose I did answer it if it is there.

Q. And that was how soon after the wreck?

A. The wreck hadn't occurred then.

Q. But how soon after this occurred were you testifying?

A. If I remember right, it was the next day.

Q. And then were you not asked this: "What time did you leave Potter?" And did you not answer: "Left Potter between 25 and 30."?

A. I might have.

Q. And then were you not asked this question: "When did you arrive at Mile Post 426?"

A. Yes, sir, I was.

Q. And did you not answer, "About 45 or 47; somewhere along there."?

A. Yes, sir.

Q. I believe you say you saw all of the signals that night?

A. Yes, sir, I did.

288 Q. Every one of them?

A. Yes, sir.

Q. Now, I will ask you if at the time you testified at the coroner's inquest this question was not asked you: "Did you see all the signals between Kimball and Mile Post 426 on the Union Pacific?" And did you not answer: "I couldn't swear to it exactly, but seen them all clear to Potter, and then I wasn't quite positively sure. I missed a couple of them, but satisfied I got the semaphores or something up

there that looked like a green light to satisfy my mind it was clear all right." Did you make that answer to that question?

A. Yes, I did.

Q. Where could you see the signals that night, Mr. Zaiesky, as you went along? That is, how close did you have to get to them?

A. Well, as I went by them.

Q. As you went underneath the signal?

A. Probably a half an engine-length ahead of me and as the engine passed them.

Q. Could you see a signal that night if you were on the track at a point fifty feet west of where the signal was?

A. If I was on the track?

Q. Yes, when your engine was running say fifty feet west of the signal, could you see it that night?

A. Well, I never watched for them at that point. I watched for them as my engine went by. I can't say whether I could or not.

Q. How did you locate the signals that night?

A. By watching.

Q. Did you know about where they were located along the track?

A. Pretty close, yes.

289 Q. And you could tell as you came by them?

A. I could tell pretty near all the time where I was at.

Q. And just as you were going by you would look up and you would see the light?

A. Yes, sir. That was my duty.

Q. Now, that was a pretty bad storm that night, wasn't it?

A. Oh, it was snowing and the wind blowing.

Q. Did you try to walk out in the storm any?

A. Yes, a little bit.

Q. Where was that?

A. At Mile Post 426?

Q. And where did you try to go?

A. To the office.

Q. Did you try to go any place from the office?

A. Back to the engine.

Q. To your engine?

A. Yes, sir.

Q. Did you start to go up to the wreck?

(Objected to as not proper cross-examination. Sustained. Exception.)

Q. How far could you see a white lantern that night?

A. About an engine-length.

Q. What kind of lights are burning in the signals?

A. At what position?

Q. I don't mean the color. I mean, what kind of lamps have they in those block signals?

A. Oil lamps.

Q. You say you saw 501 when you were on the siding at Dix?

A. Yes, sir, I did.

Q. And you knew then that 501 was running behind you?

A. Yes, sir, I did.

290 Q. About how long did it take you to make the run from Potter to 426?

A. From Potter to Mile Post, 426, twenty or twenty-five minutes; somewhere along in there.

Q. Mr. Zalesky, I will ask you at the time you testified to the coroner's jury if this question was not asked you, the question referring to the time you arrived at Mile Post 426: "State to the jury the condition of the weather at that time." And did you not answer: "The condition of the weather was snowing and wind blowing a gale. Could not see a car-length ahead of me. I was standing right by the depot and didn't know where I was at until the conductor or head brakeman who was ahead of me said, 'There is the depot.' So I saw their lamps and I followed them to the depot."

(Objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination. Overruled. Exception.)

A. Well, I probably testified that at the coroner's jury, but the depot is so small and in the dark, and I didn't have any light with me.

Q. Well, you testified to that, didn't you?

A. Yes, sir, I did.

Q. And when you testified to it at that time, it was the truth, wasn't it?

A. I swore to the truth.

Q. I will ask you if at the time you testified before the coroner's jury this question was not asked you: "You said you saw the lights of the block signal system. State to the jury how far you could see the lights." And did you not answer: "I had been looking
291 out the front window of the cab; as far as I could see them was straight up when I just went by them; probably five feet ahead of me. If I didn't get them then, I wouldn't get them." Did you make that answer to that question?

A. I don't remember.

Q. You don't remember that?

A. No, sir.

Q. You might have done so?

A. Well, I don't remember. I might and I might not.

Q. If you could see the signals as you state, the block signals as you state you could, it was perfectly safe to run trains, was it not?

A. Yes, sir.

Q. I will ask you if this question was not asked you at the coroner's inquest: "Under the weather conditions prevailing at that time, did you consider it safe to proceed with your train after leaving Kimball?" And did you not answer—

(Mr. Ellick: I object to the question, as indicated by what has already been read by counsel, as incompetent, irrelevant, and immaterial, and not proper cross-examination of this witness.
Overruled. Exception.)

Q. I will ask you if this question was not asked you at the coroner's inquest: "Under the weather conditions prevailing at that time, did you consider it safe to proceed with your train after leaving Kimball?" And did you not answer: "Well, not hardly, no." I am asking you if that question was not asked you and that answer given.

A. That question was asked me, but you read further on.

Q. Did you make that answer?

292 A. I made the answer, I remember; but it is never safe on a railroad at any time.

Redirect by Mr. Ellick:

Q. In connection with that testimony that Mr. Halligan has picked out, did you testify as follows at the coroner's inquest: "Question—Under the weather conditions prevailing at that time, did you consider it safe to proceed with your train after leaving Kimball? Answer—Well, not hardly, no. Question—Is there anything in the rules of the Union Pacific Railroad Company which would give you discretion as to tying up your train and waiting for the weather conditions to abate? Answer—I couldn't hardly answer that question; I don't know. Question—You don't know? Did you consider that night that you had a right to tie up that train without asking anybody any questions about it? Answer—Yes, sir. Question—Then you must have thought it safe to proceed, did you not? Answer—Yes, sir, but it is not safe to proceed at any time on a railroad. Question—Did you consider the dangers were any worse that night than on a day when the weather conditions were ideal? Answer—it was not as nice to work, but as far as the safety of your train, so long as you could observe your signals, I think it is safe to go."

A. Yes, sir.

Q. In connection with the testimony to which your attention was attracted by Mr. Halligan, as follows: "Question—You said you saw the lights of the block signal system. State to the jury how
293 far you could see the lights. Answer—I had been looking out the front window of the cab; as far as I could see them was straight up when I just went by them; probably five feet ahead of me; if I didn't get them then, I wouldn't get them." You said you don't remember whether you testified to that or not. If you did testify to that, was that not true?

A. It was true if I testified to it.

Q. That is, if you don't get a block signal when you are going by it, then you don't get it anyhow?

(Objected to as leading and suggestive and argumentative. Sustained. Exception.)

Q. After your testimony at the coroner's inquest, have you had an opportunity to examine any record for the purpose of refreshing your recollection as to the time of arrival and departure of your train at Potter and Mile Post 426?

(Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception.)

A. No, I haven't.

Q. Have you examined the train sheet since that time?

(Objected to as immaterial. Overruled. Exception.)

A. Well, I looked at the train sheet to look at the time I left.

Q. You looked at the train sheet to verify the time you left?

A. Yes.

Q. Does the train sheet show the time?

(Objected to as leading and suggestive and not the best evidence.)

A. It does.

(Mr. Halligan: I move to strike out the answer of the witness because it was given while I was stating my objection to the court. Overruled. Exception.)

294 Q. In connection with your testimony to which your attention was attracted by Mr. Halligan, with reference to seeing the signals between Potter and Mile Post 426, was your entire testimony in connection with that testimony as follows: "Question—On account of the weather conditions were you able to see the block signals from Kimball eastward on that trip? Answer—Yes, but you had to watch when close to them. Question—Did you see all the signals between Kimball and Mile Post 426 on the Union Pacific? Answer—I couldn't swear to it exactly, but saw them all clear to Potter, and then I was not quite positively sure. I missed a couple of them, but satisfied I got the semaphores or something up there that looked like a green light to satisfy my mind it was clear all right." Now, what signals were you not exactly sure that you had seen between Potter and Mile Post 426?

A. The signal east of Potter; the first home signal.

Q. And did you at that time afterwards satisfy yourself that you had seen that signal?

A. Yes, sir.

Q. Why couldn't you see the station at Mile Post 426 as well as you could see a red fusee or a red signal?

A. Well, on account of a depot is not a light, and I didn't have any lantern or anything else; just walking in the dark, and a little box-car depot.

Q. Was there a train standing on the north side of the depot at that time?

A. There was.

Q. How did the wind go when it came over that train?

A. Well, it was whipping and whirling around.

295 Q. Was the snow whirling also?

(Objected to as leading and suggestive. Sustained. Exception.)

A. Yes, sir.

Q. Was there snow in the air when the wind was whirling around?

A. There was.

Q. And where was this wind whirling around with reference to the depot at Mile Post 426?

A. Between the depot and the train.

Q. Did any addition, created by your engine, have any effect upon your seeing the block signals, with reference to smoke or steam?

A. Why, the smoke was blowing over a little, and a little steam. Probably it would have a little effect on seeing the blocks.

Q. In what direction would the smoke and steam blow from your engine, with reference to block signals?

A. On the same side as the block signals.

Recross-examination by Mr. Halligan:

Q. Then I understand you to say that it was perfectly safe that night to run a railroad train on the road; that is, as safe as it usually is?

A. Well, it was.

Q. Just as safe to run a train that night over that road as it would be to run it today?

A. Why, it would not be as pleasant, no.

Q. Did I ask you whether it was pleasant or not?

(Objected to as argumentative. Sustained. Exception.)

296 Q. I asked you if it was safe to run a railroad train over the road the night of the 13th of March, 1913, as it would be today.

(Objected to as not a question, but simply a declaration by counsel. Overruled. Exception.)

A. I am no judge of that at all.

Q. How many years have you been a railroad man?

A. Twelve years.

Q. How many years have you been an engineer?

A. Six years.

(Witness excused.)

CHARLES P. RICHARDSON, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. State your name to the jury.

A. Charles P. Richardson.

Q. What is your occupation?

A. Locomotive engineer.

Q. Where do you reside?

A. Cheyenne, Wyoming.

Q. By whom are you employed at the present time?

A. The Union Pacific Railroad Company.

Q. How long have you been employed by the Union Pacific Railroad Company as an engineer?

297 A. As an engineer since August, 1903.

Q. And what was your occupation before that time?

A. Why, jack of all trades. I had no regular occupation before that time.

Q. Had you been a fireman at any time?

A. Well, just previous to this time I was firing, yes.

Q. On what division are you employed?

A. On the Fourth Nebraska Division.

Q. That runs from Sidney, Nebraska, to Cheyenne, Wyoming, does it?

A. Yes, sir.

Q. And were you employed upon that division in March, 1913?

A. I was.

Q. You are the Mr. Richardson who is referred to as the engineer of Extra 510 West?

A. On March 13th, yes, sir.

Q. The train on which Mr. McConaughy was the conductor?

A. Yes, sir.

Q. I believe Mr. McConaughy testified that your train was helped out of the yard with a helper engine. Was that the fact?

A. With a switch engine, yes.

Q. Is that the customary — out of the Sidney yards, going west?

(Objected to as immaterial. Overruled. Exception.)

A. Why, in stormy weather and winter weather we pretty nearly always have a helper out of the yards.

Q. Is that due to the grade out of Sidney?

A. Yes, sir.

Q. And where does that grade become less severe?

A. Immediately at the west end of the west yards.

Q. Why is that done in cold weather?

(Objected to as immaterial. Overruled. Exception.)

298 A. It is done in cold weather on account of the cold weather has a tendency to stiffen the cars and make them hard to pull.

Q. Stiffen the oil and grease in the cars wheels?

A. Yes, sir. We call it "froze up."

Q. That is what railroad men term "frozen up"?

A. Yes, sir.

Q. And that is a stiffening of the oil on account of the temperature?

A. Yes, sir.

Q. After the train proceeds a way, does that effect upon the oil disappear?

A. Yes, sir.

Q. So it becomes necessary on that account at times to have a helper to work that out of the oil?

A. Sometimes it is impossible to start a train with one engine, where if you can get a shove of a train-length you can go right along with them.

Q. What was the condition of the rails that night?

A. The rails were damp and slippery.

Q. And what effect did that have upon your engine?

A. It made it impossible to work my engine up to its capacity.

Q. To what degree was the delay in going from Sidney to Mile Post 426 due to the slipping of your engine?

A. Well, I couldn't say exactly, but it was a great delay because of the fact that the engine wouldn't pull true. You couldn't work her to her best advantage. And another thing, when she slips, instead of moving forward the engine stands still.

Q. The wind of course had some effect upon your progress?

A. Oh, yes.

299 Q. Where did you stop your engine at Mile Post 426?

A. About a car-length east of the home block signal placed to indicate the place to stop for Mile Post 426.

Q. Did you see the home block signal at Mile Post 426?

A. Yes, sir.

Q. Is there any station between Sidney and Mile Post 426?

A. Yes, sir.

Q. What is the name of that station?

A. There are two stations between Sidney and Mile Post 426, Margate and Bronson; Margate three miles out of town, and Brownson eight miles out of town.

Q. You were facing the storm, were you?

A. Yes, sir.

Q. And on which side of the cab were you sitting, as the engineer?

A. On the right side.

Q. On the north side?

A. On the north side, yes, sir.

Q. And the wind and storm was from what direction?

A. From the north and west.

Q. So that it was blowing right at the point of your view?

A. Yes.

Q. Now I will ask you if you saw all of the block signals governing the movement of your train between Sidney and Brownson.

A. I couldn't say that I saw all of them between Sidney and Brownson.

Q. Did you see all of the block signals between Brownson and Mile Post 426?

A. I did.

Q. Did you make any change in your position after leaving Brownson that affected your view of the block signals?

300 A. Yes, sir.

Q. And that was in the cab, was it?

A. Yes, sir.

Q. In what manner were you endeavoring to see them, going from Sidney to Brownson?

A. Out of the cab window.

Q. Which window?

A. The north cab window.

Q. That is the side window?

A. Yes, sir.

Q. Now, after leaving Brownson what change did you make in your position?

A. I went to looking out of a crevice in the cab, a hole in the cab.

Q. And where is that located in the cab?

A. In the front end of the cab.

Q. And from that position the snow did not affect your view?

A. Didn't affect my eyes.

Q. How large an opening was that through which you looked?

A. Why, the hole was something, I should judge, less than an inch; just large enough so that a man could look through; possibly a full inch and maybe a little less.

Q. Is there a distance signal this side of the westbound home block signal at Mile Post 426?

A. Yes, sir.

Q. And did you see that distance signal?

A. I did.

Q. And did you see the home block signal at Mile Post 426 before you approached it?

A. As I was approaching, yes, sir.

301 Q. How far ahead could you see those signals?

A. Something in the neighborhood of a hundred feet.

Q. What was the condition of your engine when you arrived at Mile Post 426 with reference to the water in it?

A. My tank was almost empty.

Q. Was that condition reported to the operator at 426?

A. Yes, sir.

Q. By whom?

A. By myself.

Q. You went off of your engine and went up to the mile post?

A. Yes, sir.

Q. How far was that?

A. That must have been in the neighborhood of 150 feet; possibly a few feet more or less.

Q. And then did you return to your engine?

A. Yes, sir.

Q. Did you get instructions at that time with reference to what would be done for the relief of your engine?

A. While I was at the depot, yes, sir.

Q. And what were those instructions?

A. That we would couple in with Extra 504 East and come to Sidney.

Q. And then what did you do after you got that information?

A. I went back to my engine and cut it off, prepared it so that I could couple it in immediately on the arrival of 504 East, and closed up my cab and made myself as comfortable as possible until I was called on to move.

Q. Until you were informed that everything was in readiness for you to proceed?

A. Yes, sir.

302 Q. Have you ever known of an engine running out of water between Sidney and Mile Post 426 before?

(Objected to as immaterial. Sustained. Exception.)

Q. Were you subsequently notified then to come ahead with your engine?

(Objected to as leading and suggestive. Overruled. Exception.)

A. Why, subsequently—I don't quite understand the question.

Q. To come ahead with your engine and couple on to 504?

A. Yes, sir.

Q. And how were you notified?

A. The fireman caught the signal.

Q. And then did you proceed with your engine westward?

A. Yes, sir.

Q. As you were proceeding with your engine westward, did you get another signal?

A. Yes, sir.

Q. What was that signal, and from whom?

A. That was a stop signal from somebody ahead of my engine. I always thought it was the conductor, but I couldn't say positive.

Q. And what was the nature of that signal?

A. It was a stop signal.

Q. How was the signal given?

A. Given with a white lamp swung across the track.

Q. That signal that you got there was the regular stop signal, was it?

(Objected to as leading and suggestive. Sustained. Exception.)

Q. In response to that signal what did you do?

A. I stopped.

303 Cross-examination by Mr. Halligan:

Q. Mr. Richardson, this station at Brownson, is there a depot there, or just a siding?

A. At that time there was only a telephone booth in a box-car.

Q. Was there an operator there?

A. There was not.

Q. It was just a telephone booth for the use of trainmen?

A. Yes, and a passing track also.

Q. Did you stop there that night?

A. I did not.

Q. And this other town that you speak of, Margate?

A. There is nothing there except a cross-over.

Q. A siding?

A. No, not a siding; a cross-over.

Q. From one track to another?

A. Yes.

Q. From what position did you try to observe the signals from Sidney to Brownson?

A. Out of the cab window. That is the regular position.

Q. That is the side window?

185

A. Yes, sir.

Q. And after that, after you left Brownson, you observed them through a hole in the cab, you say?

A. Yes, sir.

Q. Whereabouts was that located?

A. In the front of the cab.

Q. And what kind of a hole was it? What was the purpose it was there for?

A. It was a hole made for the rod to a hand sander.

304 Q. And about how large was it?

A. Why, something in the neighborhood of an inch.

Q. A round hole?

A. Yes, sir.

Q. And you looked through there and then you could see the signals?

A. Yes, sir.

Q. That was on the front of the engine, you say?

A. The front of the cab on my side.

Q. How long did you say you had been in the employ of the Union Pacific?

A. Since November, 1899.

Q. Have you been continuously in their employ since that time?

A. No, sir, I have not.

Q. What portion of the time were you not employed by them?

A. About six or seven months altogether.

Q. Have you been employed by them continuously since this wreck?

A. I have not.

Q. How did you come to leave their employ after the wreck?

A. I was requested to.

Q. Discharged?

A. Yes, sir.

Q. And how long were you laid off?

A. Thirty days.

Q. Were you discharged the same time Mr. McConaughy was?

A. Yes, sir.

Q. On the same train?

A. Yes, sir.

Q. And for the same offense?

A. For the same offense.

305 Redirect by Mr. Ellick:

Q. You were not discharged then for testifying at the coroner's inquest?

A. I was discharged under Rule 99.

Recross-examination by Mr. Halligan:

Q. You didn't testify at the inquest, did you, at all?

A. No, sir.

(Witness excused.)

HERBERT W. CAMERON, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. What is your name?

A. Herbert W. Cameron.

Q. Where do you live, Mr. Cameron?

A. Cheyenne, Wyoming.

Q. And how long have you lived there?

A. Three years.

Q. What is your occupation?

A. Locomotive engineer.

Q. And how long have you been a locomotive engineer?

A. Twelve years.

306 Q. What occupation did you follow prior to that time?

A. Why, I was call-boy and wiper and fireman.

Q. Were you in the employ of the Union Pacific Railroad Company in March, 1913?

A. Yes, sir.

A. In what capacity?

A. Locomotive engineer.

Q. You are the Mr. Cameron who is referred to as the engineer on Extra 501 East on the night of March 13th and 14th, 1913?

A. Yes, sir.

Q. Are you in the employ of the company at the present time?

A. No, sir.

Q. When did you go out of the employ of the company?

A. The 14th of March, 1913.

Q. Were you discharged at that time?

A. Yes, sir.

Q. As a result of this wreck?

A. Yes, sir, partly.

Q. Do you remember the time that your train reached Dix, Nebraska, on the night of this wreck?

A. At 2:10 A. M.

Q. Was there another train there at that time?

A. Yes, sir.

Q. What train was that?

A. Extra 504 East.

Q. On what track was Extra 504?

A. On the passing track.

Q. And on what track did you pull down into that station?

A. On the eastbound main line, south track.

Q. Did you stop your engine in the vicinity of the engine of Extra 504?

307 A. About an engine-length east of it.

Q. Had you been having difficulty in seeing the block signals before arrival at Dix?

(Objected to as leading and suggestive. Overruled. Exception.)

A. Not very much, if any. I saw the order board at Kimball all right, and the block signals all the way to Dix.

Q. How long did your train stop at Dix?

A. Fifty minutes, about.

Q. About how long was your train there before Extra 504 East pulled out?

A. I should judge about thirty to thirty-five minutes.

Q. Did you see any of the crew of Extra 504 while you were at Dix?

A. Yes, sir.

Q. What members of the crew did you see?

A. I saw Brakeman McManus, Conductor Phillips, and Brakeman Cradit.

Q. Where did you see Conductor Phillips and Brakeman Cradit?

A. They were up on the engine there, both of them.

Q. Did you have any conversation with them on your engine with reference to the difficulty you were having in seeing the block signals?

(Objected to as a misstatement of the evidence. Overruled. Exception.)

A. Yes, sir, I did.

Q. What did you say to them, or they say to you, in that regard?

A. Do you want the conversation I had with Phillips?

Q. With reference to that one point.

A. I says: "It is pretty hard to see these block signals. Will you do a good job of flagging tonight and use lots of fusees all the way down?" I says, "I will be glad to stop for them until they burn out."

308 Q. And was Mr. Cradit present at that time?

A. Yes, sir.

Q. Was anything said by anybody there further on the subject of fusees?

A. My fireman says to them: "If you haven't got lots of them in the caboose, I have got an extra supply on the engine."

Q. What reply was made to that?

A. He says, "We have got lots of them."

Q. Who was your fireman?

A. Charles Long.

Q. I believe you used the expression, "a job of flagging." Is that expression in common use among railroad men?

A. Yes, sir.

Q. And does it have a meaning among them?

(Objected to as leading and suggestive. Overruled. Exception.)

A. We mean, take all the supplies out necessary, the equipment for doing a proper job of flagging. And when I said (interrupted)——

Q. And what supplies and appliances are those?

A. Torpedoes, red lantern, and fusees.

Q. What was said there by either Mr. Cradit or Mr. Phillips, in response to that statement, as to what they would do?

(Plaintiff objects to what Mr. Phillips said as incompetent, irrelevant, and immaterial in this case. Overruled. Exception.)

A. Mr. Phillips said he would look out for us, and Cradit was there.

309 Q. Did they leave your cab after that conversation?

A. Cradit did.

Q. He went away before Phillips did?

A. Yes, sir.

Q. And did he make any remark when he went away?

A. No, he didn't say anything.

Q. I mean with reference to what he was going to do or where he was going?

(Objected to because the witness has already answered that when he went away he said nothing, and for the further reason that the question is leading and suggestive. Overruled. Exception.)

A. Cradit said to Phillips he was going back to the caboose.

Q. How long did your train remain at Dix?

A. Fifty or fifty-five minutes.

Q. And what time did you leave Dix?

A. At 3:06 A. M.

Q. And in what direction did you proceed after leaving Dix?

A. East.

Q. What time did your train arrive at Potter?

A. 3:35 A. M.

Q. Did you stop at Potter for any length of time?

A. Stopped ten minutes to take water.

Q. What time did you leave Potter?

A. 3:45 A. M.

Q. In an easterly direction?

A. Yes, sir.

Q. Had 504 left Potter before you got there?

A. Yes, sir.

Q. When did you see 504 again?

A. Not until I hit the caboose at Mile Post 426.

310 Q. About how far from Potter is the place where the wreck occurred?

A. About seven miles.

Q. About what time did you hit the caboose?

A. 4:10 A. M.

Q. Were there any fusees on the track ahead of you before you hit the caboose?

A. No, sir.

Q. Any torpedoes?

A. No, sir.

Q. Anybody with a lantern?

A. No, sir.

Q. What did you do when you struck the caboose?

A. The first thing I did was to whistle out a flag and look at my watch to see what time it was.

Q. How fast were you going at the time you struck the caboose?

A. About five or six miles an hour.

Q. Had you located yourself along the route between Potter and Mile Post 426 in any manner?

A. Yes, sir. I located myself by the sound going over a bridge the other side of Herdon, and by going by the box-car depot at Herdon.

Q. And had you changed the speed of your train after going by these?

A. Yes, sir, I reduced from about twelve or fourteen miles an hour to about five or six.

Q. What lights did you have on the front of your engine at that time?

A. I had two white lights, one on each side, and a headlight.

Q. One on each side of what part of the engine?

A. Each side of the smoke box.

311 Q. How large a light are the lights on the side of the engine?

A. About five or six inches in diameter.

Q. What is? The bull's-eye of the light?

A. Yes, sir.

Q. Were they lighted?

A. Yes, sir.

Q. How do you know that they were lighted?

A. Well, there is a little indicator placed in the back of them for the engineer to see that they are lit; a little glass in the back of them, and I could see that from the cab.

Q. And could you see that glass?

A. Yes, sir.

Q. Do you remember how many block signals you saw between Potter and the wreck?

A. I think I saw three or four.

Q. You didn't see all of them?

A. No, sir.

Q. Was your attention attracted to anything else in passing over that portion of the track?

A. Well, I had been looking ahead for a flagman, and I had taken my head in two or three times to kind of get warm a little bit.

Q. Where had you been watching ahead for a flagman?

A. I had been looking ahead all the way, right down ahead of me.

Q. On the track?

A. Yes, sir.

Q. Did you rely upon the promise that had been made to you at Dix by Phillips or Cradit that they would protect their rear end with a good job of flagging?

(Objected to as incompetent, irrelevant, and immaterial under the issues in this case. Overruled. Exception.)

312 A. Yes, sir.

Q. And was that the reason why you were watching the track ahead of your engine between Potter and Mile Post 426?

(Objected to as incompetent, irrelevant, and immaterial, leading and suggestive, and calling for a conclusion of the witness. Overruled. Exception.)

A. Yes, sir.

Cross-examination by Mr. Halligan:

Q. Mr. Cameron, have you been in Wisconsin since you left the employ of the Union Pacific?

A. Yes, sir.

Q. Did you get a telegram from Mr. Devoe, one of the attorneys in this case, with reference to testifying in the case?

(Objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination. Overruled. Exception.)

A. Yes, sir, I did.

Q. I will ask you if in reply to that you did not demand from them \$185.00 before you would testify.

(Objected to for the reason that the telegram was in writing and should be produced. Sustained. Exception.)

Q. When did you leave Wisconsin?

A. I think it was the 4th of last month.

Q. Did you stop in Omaha as you returned.

A. I certainly did.

313 Q. Did you see Mr. Ware, the general manager of the Union Pacific?

A. I did not.

Q. Did you see any of the Union Pacific officials?

A. Yes, sir.

Q. Who?

A. I saw Mr. Barry, the master mechanic, and I saw several of them there accidentally.

Q. Did you see Mr. Ellick or Mr. Rich?

A. I saw both of them.

Q. Where did you see them?

A. Down town.

Q. Had you been requested before you left Wisconsin to stop at Omaha on your way back?

A. No, sir.

Q. Did you discuss this case with them?

A. No, sir.

Q. On your way back from Omaha to Cheyenne did you meet Mr. Miles?

A. I did not.

Q. And when did you return to Cheyenne from Wisconsin?

A. I think I got there on the 9th. I am not sure.

Q. Who was your fireman that night, the night of the wreck?

A. Charles Long.

Q. Did he leave the employ of the Union Pacific soon after the wreck?

A. That was his last trip. He had already sent his resignation in.

Q. And do you know where he went to?

A. Why, I don't know for sure; some place in Nebraska. He has always been a friend of mine.

Q. Did you go down there in Nebraska to get him a short time ago?

A. No, sir.

314 Q. Were you down at Lamar, Nebraska?

A. No.

Q. Or any place in Chase county?

A. I don't know where Chase county is.

Q. Were you at Imperial, Nebraska?

A. No, sir.

Q. Were you at the farm of Mr. Long down in Nebraska?

A. No, sir.

Q. Now, this night, you say, you left—what time was it you say you got to Dix on the night of the wreck?

A. 2:10 A. M.

Q. And did you testify in this case before the coroner's jury?

A. I did.

Q. In that testimony I will ask you if this question was not asked you: "When did you arrive at Dix approximately?" And was your answer, "2:45 A. M., I think."?

A. Why, I don't remember.

Q. You don't remember whether that question was asked you?

A. I don't remember whether that question was asked, or whether I gave the time. I had been eighty-six hours out of bed when I was put on the witness stand.

Q. But that was right soon after the wreck occurred, wasn't it?

A. Yes, sir.

Q. And what did occur during the wreck was quite vividly on your mind at that time?

A. Yes, and a whole lot more.

Q. About what time was it that you left Dix?

A. At 3:06 I left Dix.

Q. And how many times was Cradit in your engine that night?

A. He was on the engine once.

315 Q. And who did he come with?

A. He came up by himself.

Q. And when he got there who was there?

A. Mr. Phillips came up there with a message to me.

Q. How long did Cradit remain in the engine?

A. Oh, he was there probably five or six minutes.

Q. And who was there at the time?

A. My fireman and Phillips.

Q. And you saw that you asked them to do a good job of flagging?

A. Yes, sir.

Q. What are the rules of the company about flagging?

A. Do you want Rule 99?

Q. What are the rules of the company about flagging?

A. Well, to protect the rear end of the train at all times.

Q. Now, the rules of the company are to do a good job of flagging at all times, are they not?

A. Yes, sir.

Q. And you were just simply asking them to comply with the rules of the company?

A. Yes, sir; putting expression on it.

Q. Where was Cradit braking that night, do you know? On the head or rear end?

A. I don't know. I guess he was on the rear end.

Q. Well, I don't want any guess-work.

A. Well, I don't know.

Q. Where did he come from? That is, on which side of your engine did he come *it*?

A. Came up on the left side of the engine.

Q. That was the north side?

A. Yes, sir.

316 Q. And you say he staid there five or six minutes?

A. Yes, sir.

Q. And that he then went away?

A. Yes, sir.

Q. That was the last time you ever saw him alive?

A. Yes, sir.

Q. Now at the time you were at Dix that night, you had seen all the signals?

A. Yes, sir, all the way down to Dix.

Q. And you hadn't missed any of them?

A. No, sir.

Q. And after you left Dix, before you got to Potter, had you seen all of the signals between Dix and Potter?

A. No, sir not all of them.

Q. How many did you miss there?

A. I missed probably two; one or two.

Q. And what were your duties under the rules of the company when you missed those signals?

A. To stop and flag ahead.

Q. Did you do that?

A. I missed them, and I didn't see them to stop at them.

Q. Now, that is one of the dangers in running when you can't see signals, isn't it, that you don't know when to stop?

A. Yes, sir. They used to run without signals.

Q. Answer my question. That is one of the dangers in running when you can't see signals, isn't it, that you don't know when to stop?

A. Yes, sir.

Q. Did you know when you were going by the signals?

A. No, sir.

317 Q. That is, you got by the signals before you knew it?

A. Some of them; the ones that I run.

Q. Take, for instance, the first signal you ran by between Dix and Potter. When did you learn that you had run by that signal?

A. I didn't know it. That is, I didn't know until I saw the next one, and I knew I had missed one by the location of the next one.

Q. And then if that signal was clear, you went ahead?

A. Yes, sir.

Q. Now, you say, after you left Potter, how many signals did you see?

A. I saw four.

Q. Four after you left Potter?

A. Yes, sir.

Q. How many signals are there between Potter and Mile Post 426?

A. Five.

Q. Then you only missed one between Potter and Mile Post 426?

A. Yes, sir.

Q. I will ask you if at the time you testified before the coroner's jury this question was not asked you: "You may state to the jury whether or not you could see the blocks from Dix to Mile Post 426, and if you saw any, how many?" And did you not answer: "I can't say exactly how many. I saw the home block signal coming into Potter, and saw one at Point of Rocks, and saw one at Potter. After I left Point of Rocks I didn't see any."

A. I don't remember whether I made that statement or not.

Q. Will you swear that that was not your testimony?

A. No, sir, I won't swear to it, no.

318 Q. I will ask you, if you did swear to that fact at that time, being the next day after the transaction, whether or not it was true.

(Objected to as repetition. Sustained. Exception.)

Q. And at that examination was not this question asked you: "Did you see any west of Potter except the home signal?" And did you not answer, "Saw one between Dix and Potter and the one just ahead of me when I stopped. I saw that one. All I could see was one at Jacinto." I will ask you if that question was not asked you and that answer given by you to the question.

A. Most likely I did, yes.

Q. I will ask you if at that examination this question was not asked you: "You didn't catch any of the blocks between Dix and Potter except the west Home block?" That was the question that was asked you after you made this former answer, and did you not answer to that, "About two signals." Was not that question asked you and that answer given by you to the question?

A. Two or three signals would have answered—(Interrupted).

Q. I am asking you if that question was asked you at the coroner's inquest.

A. I don't remember.

Q. And did you not make that answer?

A. I don't remember.

Q. And was not this question then asked you? "The west home signals at Potter and the home signal at Dix?" And did you not answer, "Yes, sir."?

A. What is the question?

Q. I am asking you now if at this coroner's inquest this question was not asked you immediately following the former ques-

319 tion: "The west home signal at Potter and the home signal at Dix?" And did you not answer, "Yes, sir."?

A. Well, I tell you I don't care what question it is following. Just ask me that question.

Q. I will read the two questions so that you will get the context of them. I will ask you if it is not a fact that these questions were asked you and these answers given by you at that examination: "Question—You didn't catch any of the blocks between Dix and Potter excepting the west home block? Answer—About two signals. Question—The west home signal at Potter and the home signal at Dix? Answer—Yes, sir." Were not these questions asked you and these answers given by you in your testimony before the coroner's inquest?

A. I don't remember. There was so much asked me there.

Q. And then immediately following that was not this question asked you: "Then from Potter to Mile Post 426 you saw the east home signal at Potter and the one at Point of Rocks?" And did you not answer that, "Yes, sir."?

A. Yes, I remember that question.

Q. You remember that question and that answer?

A. Yes, sir.

Q. And then the next question was asked you: "And that was all you saw?" And did you not answer, "Yes, sir."?

A. I guess I did.

Q. You say you had a headlight that night?

A. I had a lantern in the headlight with the reflector behind it.

Q. Your regular headlight was an acetylene light, was it?

A. Yes, sir.

Q. Where did that go out?

320 A. It went out at Pine Bluffs. We put the lantern in at Pine Bluffs.

Q. What was the cause of your acetylene headlight going out?

A. I guess it was froze.

Q. And this lantern that was put in there was a common railroad white lantern, was it?

A. Yes, sir.

Q. Now, I will ask you if at the coroner's inquest, immediately following these questions I have asked you, was not this question asked you: "Approximately how many blocks are there between Dix and Mile Post 426? And did you not answer, "I should judge about sixteen or eighteen signals."?

A. No, sir, I never answered that way. That is a misprint. From Potter to Mile Post 426?

Q. No, from Dix to Mile Post 426.

A. I think that is a typographical error. I don't think I said that many.

Q. About how many are there between Dix and Mile Post 426?

A. I think about twelve or thirteen.

Q. And then was not this question asked you: "And you saw four?" And did you not answer, "About four or five."?

A. I don't remember.

Q. I will ask you if this question was asked you at the coroner's inquest: "You were trying all the time out of Dix to observe the position of those block signals?" And did you not answer, "Yes, sir."?

A. Yes, sir, I did.

Q. And was not the next question then asked you: "What do you say with reference to any man being able to see all of those signals between Dix and Mile Post 426?" And did you not
321 answer, "I say that a man that says that tells a falsehood, and that is telling it pretty straight."?

A. I certainly did.

Q. I will ask you if at the coroner's inquest this question was asked you: "You think, then, it would be impossible for a man, being on an engine, where there was steam and smoke in the atmosphere about the engine and the wheels throwing up snow towards the cab, and that in conjunction with this storm, to see these lights?" And did you answer: "Yes, sir. In some places the storm abated at times and it would become a little clearer sometimes. There was *storm* places where the current *or* air didn't blow the snow as bad as others."?

A. Yes, sir.

Q. And was not the next question that was asked you: "There were some places where you say it abated, and during those intervals when the storm abated some you could see the block?" And did you not answer, "Yes, sir."?

A. Yes, sir.

Q. And was not the next question that was asked you: "And when it did not abate you could not see the blocks?" And did you not answer, "No, sir."?

A. I don't remember that question.

Q. And was not this question asked you at the coroner's inquest: "Were you ever in the service during a storm similar to this?" And did you not answer, "No, sir, not so bad."?

A. Not in the service here.

Q. That is, you mean in the service on the Union Pacific?

A. On this division.

Q. And how long had you been in the service on this division?

A. Three years.

322 Q. You answered that question in that way, but it referred to your service here, did it?

A. Yes, sir.

Q. I will ask you if this question was not asked you at the coroner's inquest: "What in your opinion should have been done with trains 501 and 504 East?" And did you not answer, "I consider I should have been tied up at Kimball and 504 at Dix, put on a side-track."?

(Objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination.)

A. Yes, sir.

Q. Now, I will ask you, Mr. Cameron, why you considered that you should have been tied up at Kimball and 504 at Dix.

(Objected to as incompetent, irrelevant, and immaterial, not proper cross-examination, and calling for the conclusion and opinion of the witness. Sustained. Exception.)

Q. Mr. Cameron, what is your duty as an engineer when you run over a torpedo on the track?

A. To stop and whistle out a flag.

Q. And how long do you stop?

A. One torpedo?

Q. Well, tell one, and then I will have you explain the entire rules with reference to one or more.

A. One, just stop and whistle out a flag and call him in and proceed.

Q. How long do you stop there?

A. Five minutes.

Q. One torpedo, you would stop five minutes?

A. Yes, sir.

323 Q. Now, if there were two torpedoes?

A. Slow down under control.

Q. And do you ever put out more than two?

A. No, sir.

Q. One is to slow down, and the other is to stop and put out a flag?

A. Yes.

Q. And you stop there five minutes and then proceed?

A. Call him in and proceed.

Q. When did you see the caboose of 504 that night first?

A. At Dix.

Q. What time at Dix?

A. 2:10.

Q. At the time they were pulling out?

A. Yes, 3:06; when I was pulling in I saw it when I went by.

Q. And you saw the caboose when they pulled out on to the main track?

A. Yes, at 3:06.

Q. And when did you see it after that?

A. After I hit it at Mile Post 426.

Q. What were you doing at the time you hit this caboose?

A. I had my head out of the window.

Q. And where were you looking?

A. Looking for a flag.

Q. Looking ahead of the engine?

A. Yes.

Q. And you were going very slow?

A. Yes, sir.

Q. About five miles an hour?

A. Yes, sir.

324 Q. And you had three lights on the head of your engine?

A. Yes, sir.

Q. And you didn't know that the caboose was there until after you hit it, did you?

A. No, sir.

Q. The lights on the head of your engine didn't show you that caboose standing there until you hit it?

A. No, sir.

Q. Those lights on the head of your engine were not of any assistance that night, were they?

A. Not to me.

Q. Would an acetylene light have been better that night than a white lantern?

(Objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination. Sustained. Exception.)

Q. How far could you have seen a common white lantern that night?

A. Oh, from one car-length to a car-length and a half.

Q. Within what distance could you have stopped your train that night when you were running at five miles an hour?

A. About 200 or 250 feet.

Q. I will ask you at the coroner's inquest if this question was not asked you: "For what distance would you say you could have seen a burning fusee?" And did you not answer, "Might have got half way between the front of the engine and the cab window if not directly in front of me; but if between the rails, I don't think I could have seen it at all; might have seen a little reflection. I think I could have heard a torpedo all right."

A. I saw a fusee at Dix.

325 Q. I am asking you if that was not asked you. This was with reference to the wreck, down there at the wreck.

A. Yes.

Q. You made that answer?

A. I guess I did.

Q. I will ask you, with reference to this conversation that you had with Mr. Phillips on your engine, if you have given all of the conversation that you had with him there.

(Objected to as not proper cross-examination unless it is confined to all of the conversation with reference to the flagging. Question withdrawn.)

Q. When you testified before the coroner's inquest with reference to the conversation that you had with Phillips on your engine with reference to doing a job of flagging, did you say anything about Cradit being there?

A. I don't remember whether I did or not.

Q. Now, as a matter of fact, you said nothing about Cradit being there at that time, did you?

A. I don't think the question was asked me in that way.

Q. Wasn't this question asked you, that is, referring to Phillips: "What else did he say?" And did you not answer: "And he said they wouldn't let him. Then I said, 'Wherever you stop, throw lots of red fusees out and put a torpedo down, and give me a chance to stop. I will let you go on a way before I follow you up.'" I will

ask you if that was not your testimony with reference to that conversation before the coroner's jury.

A. That conversation with Phillips, I had that, yes.

Q. And that was your testimony there with reference to it, was it?

A. Why, I don't know whether it is word for word or not. The coroner wasn't very good at railroad questions.

326 (Plaintiff's Exhibit C is identified.)

Q. Did you receive a telegram from Devoe & Swenson when you were at Superior, Wisconsin, with reference to taking your deposition there?

A. I got a telegram wanting to know where they could get a statement from me.

Q. Did you make a reply to that?

A. I certainly did.

Q. Examine Plaintiff's Exhibit C and see if that is the telegram you sent.

A. That is it, I guess. I have got a copy of it here.

Q. Well, compare that with the copy.

A. Well, I haven't got the copy here; but that is it all right.

Q. You sent that to them?

A. Yes, sir.

(Plaintiff offers Exhibit C in evidence. Admitted in evidence without objection, and read to the jury by Mr. Halligan.)

Q. How soon after this did you leave Superior?

A. What date is that?

Q. This is the 29th.

A. Why, four or five days.

Q. And you went back to Cheyenne, did you?

A. Yes, I came down and went to Cheyenne.

Q. And did you come to see Devoe & Swenson?

A. I did not.

Q. Did Devoe & Swenson wire you the money there?

A. They never came across.

Q. Did anyone come across?

A. No, not yet. They offered to, though.

327 Q. Who offered to?

A. Devoe & Swenson.

Q. When.

A. In Cheyenne.

Q. When did they see you in Cheyenne?

A. When they took my deposition.

Q. Who offered to come across?

A. Devoe did.

Q. What did he say?

A. He said he might interest me in a candy store up here.

Q. Is that all he said?

A. He said if I needed a little spending money he might help me.

Q. What did you tell him?

A. I didn't need any; wouldn't take any *for* him or the Union Pacific.

Q. Although you sent that telegram?

A. Well, I paid my own fare down here. I have my family in Cheyenne. That is my privilege.

Q. You say you were discharged from the Union Pacific when?

A. On the 14th of March. The night of the wreck was the last trip I made.

A. And what were you discharged for?

A. Violation of Rule 508.

Q. Calling your attention to Rule 508 in Plaintiff's Exhibit B, I will ask you to state if that was the rule for the violation of which you were discharged.

A. Yes, sir.

(Plaintiff offers Rule 508 in evidence. Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, 328 and not tending to prove any of the issues in this case or any of the acts of negligence charged in the petition. Sustained. Exception.)

Q. What were you discharged for?

A. For running block signals.

Redirect by Mr. Ellick:

Q. You said you had a family in Cheyenne?

A. Yes, sir.

Q. Of what does that family consist?

(Objected to as incompetent, irrelevant, and immaterial. Sustained. Exception.)

(Defendant offers to prove by this witness that his family consists of himself and his wife and two children. Offer denied. Defendant excepts.)

Q. Were you supporting your family at that time?

A. Yes, sir.

Q. How far is Superior, Wisconsin, from Sidney, Nebraska?

A. About 960 of 970 miles.

Q. And how long does it take a person to make the trip from Superior, Wisconsin, to Sidney, Nebraska?

(Objected to as immaterial and too indefinite. Overruled. Exception.)

Q. By the ordinary route of travel?

A. Why, it takes about three days and three nights to come down by passenger, if you make good connections. Sometimes we ride freight trains, and they ain't so fast.

329 Q. Well, if you were possessed of sufficient funds to pay your fare on a passenger train, how long does it take to make the trip ordinarily from Superior, Wisconsin, to Sidney, Nebraska?

A. About three days and three nights.

Q. When you say that the placing of two torpedoes on a track is a signal to slow down, how far apart are those torpedoes placed to indicate that signal?

A. About two rail-lengths.

Q. If you strike one torpedo and don't strike another torpedo within two rail-lengths, then what do the rules require you to do?

A. Stop.

Q. Do the signals provide for placing a caution signal, as you have indicated, of the two torpedoes down, and then placing the other signal, the stop signal, down beyond that?

A. Yes, sir, if the train moves on or the flagman is called in, he takes up the one torpedo and leaves the two torpedoes out; takes up the stop torpedo and leaves the caution torpedoes there.

Q. So that when the flagman goes out, he puts down the stop torpedo?

A. First.

Q. And then goes on farther and places the two that indicate caution?

A. Yes, and then comes back to the one torpedo and stops there until he is called in.

Q. If his train is going to proceed, so it is not necessary to stop, he takes that one up?

A. He takes it up.

330 Q. That is nearer his caboose than the caution signal?

A. Yes, sir.

Q. In your testimony on cross-examination you said that you had testified at the coroner's inquest, in substance, that in answer to the question, "From what distance would you say you could have seen a burning fusee?" that it might have got half way between the front of the engine and the cab window, and might have seen a reflection, and that you could have heard a torpedo all right. What do you mean by a reflection?

A. Why, it would not be strong. It would be dimmer. The farther away it was, the dimmer it would be.

Q. When you say you might have seen it half way between the front of your engine and the cab window, what did you mean, the fusee itself or the reflection of the fusee?

A. The fusee itself.

Q. How far ahead do you think you could have seen the reflection?

A. About two car-lengths, I guess.

Q. Is there a certain reflection from the fusee in a snow storm?

A. Yes, sir.

Q. And if you had seen such a reflection on that night, would you have known what it was?

A. Yes, sir.

Q. Now, at the coroner's inquest were you also asked this question, and did you answer in this manner: "Question—In your judgment, if a torpedo had been placed on the rail about 500 feet west of the caboose of train 504, do you think that would have prevented you from striking the caboose?" And in answer to that question did you make this reply: "Without a doubt, sir, I do. Had a good brake on

the train, and no trouble to stop any place. It was an extra
331 good braking power; good brake on the train.”?

(Objected to as not proper redirect examination. Overruled. Exception.)

A. Yes, sir.

Q. In your cross-examination this question was propounded to you, and this answer made: “Question—What in your opinion should have been done with trains 501 and 504 East? Answer—I consider I should have been tied up at Kimball and 504 at Dix, put on a side-track.” Did you base that upon the knowledge that you possessed at that time, or the knowledge you knew the dispatcher possessed?

A. I didn’t base it on the weather conditions around Kimball. I based it on what I found out afterwards.

Q. What you learned yourself afterwards?

A. Yes, sir.

Q. You had no information as to what knowledge the operator or dispatcher had of the conditions of the storm?

A. No, sir.

Q. Why didn’t you tie up your train at Dix?

A. Well, we were coming along all right, and wanted to get in where we could eat and sleep.

(Plaintiff moves to strike out the answer as not proper redirect examination. Sustained. Exception.)

Q. Did the conversation to which you have testified with Mr. Phillips, and in the presence of Mr. Cradit, have anything to do with your determination of the question whether you would tie up at Dix or not?

(Objected to for the reason that it calls for no fact but simply a conclusion of the witness. Sustained. Exception.)

332 (Defendant offers to show by the witness that it did. Offer denied. Defendant excepts.)

Q. In what way did that conversation determine your decision on that matter?

(Objected to as incompetent, irrelevant, and immaterial, calling for a conclusion of the witness, and speculative. Sustained. Exception.)

(Defendant offers to show by the witness that it was on account of the promise of Phillips in the presence of Cradit that they would protect his train with a good job of flagging and the use of plenty of fuses. Offer denied. Defendant excepts.)

Q. Would it have been safe then for you to have continued the progress of your train from Dix in pursuance of this promise made by Mr. Phillips in the presence of Mr. Cradit, had they complied with that promise?

(Objected to as leading. Overruled. Exception.)

A. Yes.

Q. I will ask you if this question was not asked of you at the

coroner's inquest, and this answer made: "Question—Did you at any time during that trip request the dispatcher to tie you up at any place? Answer—No, sir, I did not."

(Objected to as incompetent, irrelevant, and immaterial, and not proper redirect examination. Sustained. Exception.)

Q. Did you at any time during that trip request the dispatcher to tie you up at any place?

A. No, sir.

Q. How were your brakes on that train that night?

A. Extra good braking train.

333 Q. What sort of a signal did you give when you whistled the brakeman out at the time of the wreck?

(Objected to as immaterial. Overruled. Exception.)

A. One long and three short blasts of the whistle.

Q. You were asked something this morning, Mr. Cameron, with reference to your fireman, Mr. Long. Did you go to see Mr. Long some time before this trial?

A. Yes, sir.

Q. And I believe you said you did not go to Lamar to see him?

A. No, sir.

Q. Nor to Imperial?

A. No, sir.

Q. Nor to Long's farm?

A. No, sir.

Q. Where did you go to see Mr. Long?

A. I went to Colorado, on his father's farm.

Q. And when was that?

A. It was two weeks ago last Saturday. What day did we have the depositions taken in Cheyenne?

Q. The day that the plaintiff took your deposition in Cheyenne?

A. Yes, sir.

Q. And at whose request did you go?

A. The attorneys of the Union Pacific.

Q. And what was the purpose of going?

(Objected to as incompetent, irrelevant, and immaterial. Sustained. Exception.)

Q. Did you see him there?

A. Yes, sir.

Q. And what did you do there?

A. Told him that you sent me there to see if we would come to this trial.

334 Q. And is the place where he was out of the jurisdiction of this court?

(Objected to as calling for a conclusion of the witness. Sustained. Exception.)

Recross-examination by Mr. Halligan:

Q. How long did you stay down there with Long?

A. I got there about 4:30, Sunday, at his house, and left there about 7:30 and went to Holyoke, Nebraska, to catch the Burlington train at 3:15.

Q. Did he go with you?

A. He drove me into town.

Q. Did he go from town with you?

A. No, sir.

Q. How far does he live from Holyoke?

A. Eighteen miles.

Q. And you went out there?

A. Yes, sir.

Q. Did you give him any money when you were there?

A. No, sir.

Q. He agreed to come to attend the trial, did he?

A. Yes, sir.

Q. And did you see him after that time before you came to Sidney?

A. No, sir.

Q. Who controls the rear brakeman on a freight train, the conductor?

A. Yes, sir.

Q. While you were at Dix, how many times was Conductor Phillips at your engine?

335 A. Twice. He was there twice.

Q. And when was it that Brakeman Credit was there with him?

A. The first time.

Q. And how long was that after you got to Dix?

A. Oh, it wasn't over eight or ten minutes.

(Witness excused.)

CHARLES W. LONG, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. What is your name?

A. Charles W. Long.

Q. Where do you reside?

A. In Chase county, Nebraska.

Q. What was your occupation in the fore part of March, 1913?

A. Locomotive fireman.

Q. On what railroad?

A. Union Pacific.

Q. And on what division?

A. Fourth.

Q. Fourth Nebraska Division?

A. Yes.

Q. Operating between Sidney and Cheyenne?

A. Yes.

336 Q. Are you the Mr. Long who has been referred to here as the fireman on engine 501 on the night of March 13th and 14th, 1913?

A. Yes.

Q. Were you on your engine when you stopped at Dix, Nebraska, that night?

A. Yes.

Q. Who came on to that engine there?

A. Phillips, Cradit, and McManus.

Q. When was McManus there with reference to the time when Phillips and Cradit were there?

A. He was there before they were.

Q. While Mr. Phillips and Mr. Cradit were on your engine, did any conversation take place between Cameron, yourself, and Phillips and Cradit with reference to having difficulty of seeing the block signals and the manner in which you would proceed eastward?

A. Yes.

Q. What was said with reference to that matter?

A. Well, Cameron says to them, "If you fellows start out there, you want to use extra precaution and do a good job of flagging and use plenty of fusees." I asked Phillips if he had plenty, and he said Yes, and I told him if he didn't I had an extra amount there that night.

Q. Do you remember what time you left Dix?

A. No.

Q. You were on the engine at the time of the wreck?

A. Yes.

337 Cross-examination by Mr. Halligan:

Q. Have you repeated about all of the conversation that was had between Mr. Phillips and Mr. Cameron and yourself that night with reference to doing a job of flagging?

A. Yes.

Q. How long was it after you arrived at Dix before this conversation occurred?

A. Oh, I should judge about ten minutes.

Q. And did Mr. Phillips and Mr. Cradit come there together?

A. No.

Q. Who came there first?

A. Phillips.

Q. How long was he there when Cradit came?

A. Oh, just a little while.

Q. How long did Cradit stay there?

A. Oh, just a few minutes.

Q. Did they leave together, Cradit and Phillips?

A. They didn't get off the engine together.

Q. Who got off first?

A. Cradit.

(Witness excused.)

338 FRED BRENDL, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. What is your name?

A. Fred Brendel.

Q. What is your occupation, Mr. Brendel?

A. I was railroading, but not at the time I was called here.

Q. Where is your home?

A. Manley, Iowa.

Q. And you came over here for the purpose of attending this trial as a witness?

A. Yes, sir.

Q. At the request of the Union Pacific railroad?

A. Yes, sir.

Q. Were you in the employ of the Union Pacific Railroad on March 13th and 14th, 1913?

A. Yes, sir.

Q. On what division were you employed?

A. On the Fourth District, between Sidney and Cheyenne.

Q. In what capacity?

A. I was brakeman.

Q. Are you the Mr. Brendel who has been referred to here as the rear brakeman on Extra 501 East?

A. Yes, sir.

Q. Did you see train 504 at Dix when you pulled in there that night?

A. Yes, sir.

Q. What did you do when you got to Dix?

339 A. I started up to look over my train, and then I went up to the office.

Q. What do you mean by looking over your train?

A. To see if the train was in running condition.

Q. What they call inspecting the train?

A. Yes, sir.

Q. Is that one of the duties of a brakeman at certain stops?

A. It is his duty; or, if the conductor goes up, my duty is to flag, protect the rear end.

Q. Whoever goes up inspects the train?

A. Yes, sir.

Q. And the other fellow does the flagging?

A. Yes, sir.

Q. Where did you go at Dix after you inspected your train?

A. I went up to the office.

Q. How long did you stay at the office?

A. I should judge about fifteen or twenty minutes.

Q. And then where did you go?

A. I came back with Conductor Phillips to the switch.

Q. Which switch?

A. From the passing track to the main line. And I told Mr. Phillips that I—— (Interrupted.)

Q. The east or west switch at Dix?

A. East.

Q. And what did you do at the east switch?

A. After Conductor Phillips pulled out of there, I had to dig out the snow from the switches and close the switch.

Q. Both switches?

A. Yes, sir.

Q. Is that what you did after you came back from the station?

340 (Objected to as leading and suggestive. Overruled. Exception.)

A. (No answer.)

Q. Then what did you do after you threw those switches?

A. I delivered the order to our engineer and then delivered the rear orders to Conductor Buckingham.

Q. What part of the train did you get on?

A. On the rear of the train.

Q. Did you walk back to the rear of your train, or did you wait until the train pulled out?

A. No, sir, I walked back before it started.

Q. Were you on this train at the time of the wreck?

A. Yes, sir.

Q. And where were you riding at that time?

A. In the cupola.

Q. In the cupola of the caboose of train 501 East?

A. Yes, sir.

Q. When this train stopped, what did you do?

A. When the train stopped I went back and put a torpedo and a fusee down, I should judge about a quarter of a mile, and then I went up to the engine and I asked Cameron if I could do anything up there—— (Interrupted.)

Q. Never mind the conversation. You went up to your engine?

A. Yes, sir.

Q. That was the length of your train?

A. Yes, sir.

Q. And then what did you do after you went up to your engine?

A. I asked Cameron if he thought—— (Interrupted.)

Q. No, not any conversation; just what you did. Did you stay there any length of time?

A. I staid there about five minutes.

341 Q. And then where did you go?

A. I went back and protected the rear end of our train.

Q. How far back did you go at that time for the purpose of protecting your train?

A. To Herdon.

Q. At what they call the station at Herdon?

A. Yes, sir.

Q. And what did you do there?

(Objected to as immaterial. Overruled. Exception.)

A. I called the dispatcher and told him what had happened and asked him if he knew where Buskingham was; and he said he had all trains protected.

Q. He had been advised of the wreck before you got there?

A. Yes, sir.

Q. What did you do at the Herdon station with reference to putting down any torpedoes or fusees?

A. I put down two torpedoes at Herdon, and then went back and put one down and a fusee.

Q. Went back farther from the station again?

A. Yes, sir.

Q. Farther west?

A. Yes, sir.

Q. And then what did you do?

A. Went in the office and built a fire.

Q. In the office at Herdon.

A. Yes, sir.

Q. Have you calculated the distance that you covered that night as you have described?

A. Do you mean just the trip back to Herdon?

Q. No, the entire trip of going from the rear end of your train back a quarter of a mile to put down a fusee and torpedo, and
342 then up to your engine, and then back to Herdon, and then out west of Herdon to put down some torpedoes?

A. Yes, sir.

Q. What was the distance?

(Objected to as a matter for the jury to determine. Overruled. Exception.)

A. I should judge a mile and a half or two miles.

Q. How far was it from the rear end of your train to Herdon?

A. About three-quarters of a mile, I should judge.

Q. What was the condition of the track at that time in the rear of your train as to snow being on it or not?

(Objected to as immaterial. Overruled. Exception.)

A. Why, the track was clear until I got back to the switch, but from the switch on to Herdon there was more or less snow on the track.

Q. Do you know what that was due to?

(Objected to as calling for a conclusion of the witness. Overruled. Exception.)

A. Yes, sir.

Q. Why had the snow accumulated on the track there and not east of that point?

(Objected to as not a question that calls for expert testimony, and immaterial and irrelevant. Overruled. Exception.)

A. On account of the grade from the railroad train to the switch; and from the switch to the station at Herdon it is a little bit down grade there and low, and the snow staid right there.

Q. Were you in the vicinity of your caboose when the first train came from the westward after the wreck?

A. Yes, sir.

343 Q. What was that train?

(Objected to as too indefinite as to time. Overruled. Exception.)

A. I think it was the snow plow came down.

Q. And when did the snow plow come?

A. About twenty-four hours afterwards, I should judge.

Q. Had you picked up any of the torpedoes that you had placed there on the track immediately after the wreck?

(Mr. Halligan: Objected to as immaterial. They have already testified that those torpedoes exploded, and Cameron has testified that he heard them.

Question withdrawn.)

Q. When you made that walk that night that you have described, immediately after the wreck, how did you proceed, backwards or forwards?

A. Forwards.

Q. What was the condition of the track with reference to the surrounding country from the rear end of your train to the east switch at Herdon, with reference to the level of the surrounding country, higher or lower?

A. Higher.

Q. What kind of a track was along there, single or double track?

A. Single track.

Cross-examination by Mr. Halligan:

Q. Did you walk on the track all the way up?

A. I did from the rear of the caboose.

Q. Walked in the center of the track, did you?

344 A. I did from the rear of my caboose to the switch, but I got off from the switch to the station at times.

Q. How far did you get off?

A. I got off until I hit the right-of-way fence.

Q. And how did that happen?

A. Well, I would just naturally run on to a drift of snow and get off.

Q. Was it snowing pretty hard?

A. Why, I couldn't say whether it was snowing very hard or not but it was blowing snow.

Q. It was blowing pretty hard?

A. Yes, sir.

Q. A good deal of snow in the air?

A. Yes, sir.

Q. How many times did you hit the right-of-way fence?

A. I think it was two or three times. I wouldn't say for sure.

Q. And how far was it from the end of the switch up to Herdon?

A. I should judge about sixty car-lengths; 55 or 60.

Q. And about how far was it from that switch down to your caboose?

A. A half a mile.

Q. About how many car-lengths would that be; about the same?

A. No, it would be more than that, I should judge.

Q. When you got to Dix you were on the main line there?

A. Yes, sir.

Q. Who flagged your train there?

A. What do you mean? Protected?

Q. Yes.

A. Conductor Buckingham.

Q. And you went up forward?

A. Yes, sir.

345 Q. How long was your train at Dix?

A. I should judge about 45 to 55 minutes.

Q. Who was riding in your caboose that night?

A. We had one stockman.

Q. Do you know who he was?

A. I do not.

Q. How long were you at Dix, in your judgment?

A. I should judge about forty-five or fifty minutes.

Q. And how long did you stop at Potter?

A. I should judge about ten or fifteen minutes.

Q. Did you have a conductor on your train after you left Potter?

A. Not on the caboose.

Q. Who was your conductor?

A. Conductor Buckingham.

Q. Where was the last time that you saw him that night?

(Objected to as not proper cross-examination. Sustained. Exception.)

Q. How long did you stop at the station at Herdon?

A. I should judge about three hours; two and a half to three hours.

Q. And then where did you go?

A. Down to our engine again; engine 501.

Q. You staid there until daylight, did you, at Herdon?

A. Yes, sir.

(Witness excused.)

346 WALLACE LYNCH, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. Your name is Wallace Lynch?

A. Yes, sir.

Q. Where do you reside?

A. Oregon.

Q. Were you in the caboose of freight train Extra 504 East that was run into on the morning of March 14, 1913?

A. Yes, sir, I was.

Q. Who was in the caboose at the time that the caboose was struck?

A. Well, there was myself and six other men.

Q. Was the conductor of the train in the caboose at that time?

A. Yes, sir.

Q. That was Mr. Phillips?

A. Yes, sir.

Q. Was Brakeman Cradit in the caboose at that time?

A. Yes, sir.

Q. And was there a man by the name of Farrell in the caboose at the time?

A. Yes, sir.

Q. And who were the other men.

(Objected to as immaterial. Overruled. Exception.)

A. Well, they were stockmen helping with the sheep.

Q. How many other stockmen were there besides Farrell and yourself?

A. There were three others.

Q. Were you in the employ of the Union Pacific at that time?

A. No, sir.

347 Q. How did you happen to be on that caboose?

A. I was in charge of the sheep, thirty-three cars of the sheep.

Q. And what is your business?

A. Labor.

Q. And you were in charge of the sheep, coming from your home and going eastward?

A. Coming from Buell, Idaho.

Q. Do you remember when your train that night reached Dix, Nebraska?

A. I don't know where Dix is.

Q. Do you remember when your train reached the second stop back from the wreck?

A. I remember stopping there, but I don't remember where or what time it was. I remember the stop.

Q. Do you remember whether or not they made a long or short stop there?

A. It was a long stop.

Q. Did the brakeman and conductor get out of your caboose at that stop?

A. Yes, sir.

Q. Do you remember of the stop just before the wreck?

A. Yes, sir.

Q. Were you awake during the time your train proceeded from Dix up to the time of the wreck?

A. Yes, sir.

Q. How long had your train stopped at the place where the wreck occurred before it was struck by the engine of 501?

A. I don't know just how long.

Q. Well, about how long?

A. Oh, about fifteen minutes, I should judge; maybe longer.

348 Q. Did Brakeman Cradit go out of the caboose immediately upon your train stopping there?

A. Yes, sir.

Q. What door of the caboose did he go out of?

A. The front door, next to the stock car.

Q. Did he take any fusees or torpedoes with him when he went out?

(Objected to as leading and suggestive. Sustained. Exception.)

Q. What, if anything, did he take out with him when he went out that time?

A. I don't remember of seeing him take anything.

Q. How long was he gone that time when he went out?

A. Oh, I couldn't tell exactly; just a short time, though.

Q. Well, about how long in minutes.

A. Probably a couple of minutes.

Q. And then he came back in the train, did he?

A. Yes, sir.

Q. Through what door?

A. The front door.

Q. By the front door you mean the east door of the caboose?

A. Yes, sir.

Q. Was anything said between him and Mr. Phillips when he returned?

A. Yes, sir.

Q. What was said?

(Objected to as immaterial under the issues of the case. Overruled. Exception.)

A. Mr. Phillips asked him what he learned. He said he didn't learn anything. He said he was looking for a sidetrack, but didn't see any.

349 Q. Did he go out a second time while you were there, during the time when you stopped up to the time of the wreck?

A. Yes, sir.

Q. How long after the first time did he go out the second time?

A. I don't remember how long it was; not very long, I don't think.

Q. About how long was it before the wreck?

A. Well, I don't remember exactly. I don't remember just how long it was.

Q. What door did he go out of when he went out the second time?

A. Went out the front door.

Q. The same door that he had gone out of before?

A. Yes, sir.

Q. And how long was he gone that time?

A. Oh, probably two minutes; about the same length of time he was the first time, as near as I can remember.

Q. And what did he take with him, if anything?

A. I don't remember seeing him take anything.

Q. When he came back was there anything said between him and Mr. Phillips?

A. Yes, sir.

Q. What door did he come back through when he came back?

A. The same door he went out at.

Q. And what was said between him and Mr. Phillips when he returned that time?

(Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception.)

A. Mr. Phillips asked him, "What did you learn this time, Charlie?" And he said, "Not any more than I did before. I think they are spacing us, but I can't tell."

350 Q. Did anyone say anything about going out to protect the rear end of the train by flagging?

(Objected to as leading and suggestive, calling for a conclusion of the witness, and incompetent, irrelevant, and immaterial under the issues in this case. Sustained. Exception.)

Q. Was anything said there by or to Mr. Cradit with reference to flagging the train?

(Objected to as leading and suggestive. Overruled. Exception.)

A. I didn't hear anything said.

Q. Did you hear, at any time there, either the conductor Phillips in the presence of Cradit, or Mr. Cradit state as to whether or not a train was following them?

(Objected to as immaterial. Overruled. Exception.)

A. Yes, I did.

Q. Did Mr. Cradit or Mr. Phillips go out any other time during the time you staid at the point where the wreck occurred than the times you have related?

A. No, sir.

Q. Did Mr. Phillips go out of the caboose at all that night at that point?

A. No, sir.

Q. How long after Mr. Cradit came back the second time did the wreck occur?

A. Well, I don't remember exactly. It seems to me like it was just a few minutes, just a little while.

Q. About how many minutes?

A. Oh, I don't know. It might have been five minutes; something like that; it might have been less. I didn't have any time-piece.

351 Q. What did they say with reference to the train coming behind them at that time?

(Plaintiff objects to what Phillips said there as incompetent, irrelevant, and immaterial.)

Q. By Cradit or in the presence of Cradit?

(Objected to as immaterial. Overruled. Exception.)

A. What did Cradit say, you mean?

Q. Either Cradit or what Phillips said in the presence of Cradit there with reference to the train following them.

A. I don't remember Phillips saying anything about it.

Q. What did Mr. Cradit say?

A. He said, "That son of a bitch has got his guts, stopping here when he knows there is another train following."

Q. And what further was said, if anything, with reference to the train following?

A. Why, I don't remember what was said after that.

Q. Was anything said there at that stop with reference to the possibility of the following train striking you?

(Objected to as leading and suggestive and calling for a conclusion of the witness. Sustained. Exception.)

Q. What further was said there that you can remember with reference to the following train?

A. Why, Mr. Phillips said, "If she hits us tonight, our debts are paid."

Q. And when was that with reference to the second time that Cradit went out of the front door?

A. Just afterwards.

Q. And when was that remark made with reference to the time of the wreck?

A. Just immediately before the wreck.

352 Q. And while you were standing still on the track?

(Objected to as leading. Sustained. Exception.)

Q. Had your train moved any before the wreck from the time you first stopped?

A. No, I don't think so.

Q. Was your train moving at the time you were struck?

A. No, sir.

Cross-examination by Mr. Halligan:

Q. Now, when Mr. Cradit went out the east door of the caboose, the wind was blowing pretty hard, wasn't it, from the northwest?

A. Yes, sir.

Q. And would have blown in the door quite severely if he had gone out that door?

A. Yes, sir.

Q. Did he have his lantern when he went out?

A. I don't know whether he did or not. I don't remember.

Q. You don't remember what he had when he went out?

A. No.

Q. And you were not paying particular attention to what he had with him when he went out?

A. No, sir.

Q. And you don't know what he did when he went out?

A. No, I don't.

Q. You don't know whether he went up west of his train, or down east along the train, do you?

A. I don't know.

353 Q. You still sat in the train where you were?

A. I was lying down.

Q. Were the other stockmen lying down?

A. Part of them were lying down. Some of them were sitting up.

Q. What was Mr. Farrell doing?

A. He was lying down.

Q. Was he awake or asleep, if you know?

A. I suppose he was asleep.

Q. And you wouldn't undertake to say how long he was out of the car that night, would you, that is, Mr. Cradit, at the time he went out that time at the stop?

A. Well, I don't know exactly how long he was out; not very long though; just a short time.

Q. And you wouldn't undertake to say how long the train was there, would you?

A. Not exactly. I don't know.

Q. How long after he went out the first time was it before he went out the second time?

A. I couldn't say. I don't remember.

Q. How long was it after the train stopped before he went out the first time?

A. He went out immediately after the train stopped.

Q. And he said that he couldn't tell where they were?

A. Yes, sir.

Q. That he was looking for a sidetrack?

A. Yes.

Q. But he couldn't find any sidetrack?

A. No, he said he couldn't find the sidetrack.

Q. Now, did you notice what he took out with him when he went out the second time?

A. I did not.

354 Q. And you don't know whether he took a lantern out with him or not?

A. I do not.

Q. Or anything else?

A. No. I didn't see anything.

Q. And you don't know what he did after he went out?

A. No, sir.

Q. Nor which direction he went?

A. No, sir.

Q. When was it he said he thought they were spacing them?

A. The second time.

Q. That is, when he came in the second time?

A. Yes, sir.

Q. Now, just tell the language that he used there about spacing them.

A. He said, "I think they are spacing us, but I can't tell."

Q. Did you understand what that was?

A. Well, I had an idea of my own what he meant by it.

Q. What did you understand by it?

A. Well, I supposed that he meant that the dispatcher allowed them to run from one station to another before allowing another train to follow them, or something like that.

Q. One telegraph station to another?

A. Yes.

Q. How long was it after Brakeman Cradit returned the second time that the wreck occurred?

A. I couldn't tell you. It was not very long, though.

Q. Now, at this second stop, before you got to the place where the wreck occurred, where you stopped so long, I believe you stated that the conductor and brakeman both went out?

A. I think so.

355 Q. Did they go out together?

A. I don't remember whether they went out together or not.

Q. And how long were they gone?

A. Oh, I don't know. The brakeman came back first. The conductor was gone quite a while.

Q. And was the brakeman gone very long?

A. I don't remember how long he was gone.

Q. What is your recollection now about the time that the brakeman was gone there at that point?

A. Well, sir, it don't seem to me like he was gone but a little while. I couldn't say for sure.

Q. But the conductor, you remember, was gone a long time?
A. Yes.

Q. Now, you say, down here at the point where the wreck occurred, that the brakeman, Cradit, went out immediately after the train stopped, the first time?

A. Yes, sir.

Q. And you think he was gone about two minutes?

A. Something like that, yes.

Q. And then how long did he stop in the caboose before he went out again?

A. I don't know how long it was.

Q. Well, about how long would you say?

A. Why, it might have been either four or five minutes; something like that. It is just guessing with me. I don't know.

Q. And then you think he was gone again two or three minutes?

(Objected to as assuming a fact not proven. Overruled. Exception.)

A. (No answer.)

Q. And then he came back, and how long was he in the caboose, in your judgment, before the wreck occurred, before you
356 were struck by the engine?

A. Well, it don't seem to me like it was very long. I couldn't say how long he was in there.

Q. Could you make an estimate of how many minutes he was

there after he came back the last time before the wreck occurred?

A. Oh, I could guess. I don't know how close I could guess.

Q. Just your best recollection. What is your best recollection about that, how long he was back after he came back the second time before you were struck by the engine?

A. Well, as I remember it, he wasn't there but a very few minutes; four or five minutes maybe.

Q. But you wouldn't undertake to say how many?

A. No, I wouldn't because I don't know.

Q. Now, this first time he was out there; you are just guessing about how long he was gone, are you not?

A. Yes, sir.

Q. And you wouldn't swear positively that he was not out three minutes, would you?

A. No, I couldn't.

Q. You wouldn't swear positively that he was not out four minutes, would you?

A. No, not positively.

Q. Would you undertake positively to swear that he was not out five minutes?

A. I don't think he was. I don't know.

Q. But you wouldn't even be positive about that, would you, Mr. Lynch?

A. Well, I am not positive about any of this time, I'll tell you that.

Q. And the same is true about the second time he went out?

A. Yes, sir.

357 Q. You wouldn't undertake to say how long he was gone?

A. No, sir, not exactly.

Redirect by Mr. Ellick:

Q. What is your best impression as to the time that he was gone when he went out those two times?

(Objected to as repetition. Sustained. Exception.)

Q. Was he gone long enough to go back and flag at either one of those times that he went out on the front platform?

(Objected to as calling for a conclusion of the witness, and no foundation laid. Sustained. Exception.)

Q. Was he gone long enough for a man to go out of the front door of the caboose and get down off of the caboose and on to the ground and go back of his train to flag?

(Objected to as calling for an opinion upon a question which the jury are just as competent to determine as the witness is, and incompetent, irrelevant, and immaterial. Sustained. Exception.)

(Defendant offers to show by this witness that his answer to that question will be "No." Same objection as to the question. Offer denied. Defendant excepts.)

Q. Do you know about how long it would take a man to go back

a quarter of a mile from his caboose after getting off of it in a storm of the kind that was prevailing that night?

(Objected to as incompetent, irrelevant, and immaterial, and calling for an opinion on a fact that the jury can pass on
358 as well as the witness or anyone else. Overruled. Exception.)

A. No, I don't know how long it would take him.

Q. Well, have you any idea about how long it would take?

(Objected to as repetition. Sustained. Exception.)

(Defendant offers to show by the witness that he has. Objected to as incompetent, irrelevant, and immaterial, and calling for an opinion on a fact that the jury can pass on as well as the witness or anyone else, and a repetition. Sustained. Offer denied. Defendant excepts.)

Q. Now what do you say as to whether it would have been possible for Mr. Cradit to have gone back and flagged in that manner in the time that he was out of the caboose?

(Objected to for the reason that there is no evidence that the witness knows what length of time it would require, and the question is too indefinite as to distance, and for the further reason that the witness has stated the time that in his opinion and judgment Mr. Cradit was out of the caboose, and the jury are entirely competent to judge what he could have done under the evidence in this case within that time. Sustained. Exception.)

(Defendant offers to show by this witness that it would not have been possible. Same objection as to the question. Offer denied. Defendant excepts.)

359 Recross-examination by Mr. Halligan:

Q. After your train arrived at Dix, which is the second stop you made before you were struck by the following train, how long was it after your train arrived at that point before Brakeman Cradit left it?

A. I don't remember. It seems to me that he left immediately after we stopped.

Q. And you say he was not gone a very long time?

A. It don't seem to me he was.

(Witness excused.)

JOHN FARRELL, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. State your name?

A. John Farrell.

Q. And where do you live?

A. Chicago, Illinois.

Q. And what is your business?

A. I am an electrician.

Q. Were you on the caboose of Extra 504 East on the Union Pacific railroad between Cheyenne and Sidney, on the night of March 13th and 14th, 1913?

A. Yes, sir.

360 Q. Were you in the employ of the company at that time?

A. No, sir.

Q. How did you happen to be on the caboose that night?

A. I was helping James Mulligan with the stock.

Q. How many persons were in the caboose that night?

A. Seven.

Q. And how many were trainmen and how many were stockmen?

A. Five stockmen and two trainmen.

Q. And who were the trainmen?

A. Conductor Phillips and Brakeman Cradit.

Q. Were any of the stockmen killed in that wreck?

A. There were three.

Q. Were you awake when the train was at Dix?

A. Yes, sir.

Q. What did Mr. Cradit do when the train stopped at Dix?

A. Both Mr. Cradit and Mr. Phillips got out and went to the head end.

Q. How long about was Mr. Cradit gone?

A. Mr. Cradit was gone about a half an hour.

Q. And when did he come back with reference to the time Mr. Phillips got on the caboose?

A. Mr. Phillips didn't get on the caboose until it was pulling out.

Q. And when did Mr. Cradit get on?

A. About a half an hour after he left.

Q. Before the train had started to pull out?

A. Yes, over an hour before.

Q. Did you have a conversation there with Mr. Cradit with reference to your train and train 501?

A. Yes, sir.

361 Q. What was that conversation?

(Objected to as incompetent, irrelevant, and immaterial under the issues. Overruled. Exception.)

A. There was talk about running this Extra 501 ahead of us, and I said it would be a hell of a way to run a freight train ahead of a stock train with all that stock there; we ought to get in and unload some place.

Q. And what further was said with reference to those two trains?

A. There wasn't much more said, and we pulled out ahead of 501.

Q. The stock train, your train, pulled out ahead of 501?

A. Yes.

Q. Now, were you awake when you got to Potter?

A. Yes, sir. I was lying down, but I was awake all night long.

Q. Did you have any conversation with Mr. Cradit then with reference to train 501, the train following you?

A. No, not there.

Q. Did you have any conversation with Mr. Cradit with reference to the use of fusees, that night on that caboose?

A. Yes, sir.

Q. Where did that conversation take place?

A. That conversation took place after he came in and said he thought that son of a bitch was spacing us, that he would stop him; and I said, "How the hell would you stop him?"

Q. What did he say to that?

A. He said all he had to do was to throw a fusee off and he couldn't go by until it burned out.

Q. Were you awake when you stopped at the point of the wreck?

A. Yes.

Q. And were you awake during the time that you were stopping there?

362 A. Well, I was half awake and half asleep. I was just dozing off, and the corner was cold and I couldn't sleep.

Q. Did you hear any talk between Conductor Phillips and Brake-man Cradit at that point?

A. I heard Conductor Phillips say, "What did you find out now, Ray?"

Q. And did you hear what Cradit's answer was?

A. He says, "I can't find anything."

Q. And did you notice whether either of them got out of the caboose?

A. No, they both were standing in front of the stove.

Q. I mean during any of the time there, were you awake enough to notice whether either of them went out?

A. Yes, Cradit passed by my head going out of the front door.

Q. How long was he gone?

A. He was gone a couple of minutes.

Q. And were you awake the second time when he went out?

A. Yes, I was awake; I was just dozing off.

Q. And did you notice when he went out that time?

A. Yes, because Phillips says to him, "Take the south side of the train."

Q. And how long was he gone that time?

A. He was gone about five minutes.

Q. And was anything said when he came back that time?

A. That was when he came back in and said he couldn't find out anything. None of us knew where we were at; didn't know what station it was, or where we were stopped, or anything else.

Q. Well, what were they endeavoring to do, Cradit and Phillips, there?

(Objected to as calling for a conclusion of the witness. Overruled. Exception.)

363 A. They were trying to find out and wondering why they were stopped there, and what the station was, and what the stop was.

Q. Did Cradit take any fusees out with him when he went out?

A. All I saw him take was his lantern.

Q. Which lantern, his red or his white lantern?

A. The white.

Q. Did you hear the remark that Phillips made just before the engine hit the caboose?

(Objected to as leading and suggestive. Overruled. Exception.)

A. Yes.

Q. What was that?

A. He says, "If we are hit now, our debts will be paid."

Q. Had they been discussing there train 501?

(Objected to as leading and suggestive. Sustained. Exception.)

Q. Did they have any discussion with reference to any other train that you heard?

A. Yes, sir.

Q. What other train were they talking about?

A. We were talking about the train that was following us. In fact we knew this train was following us from about eleven o'clock, and we had been talking about it all night long, about them following us.

Q. What did they say at that time with reference to that train?

(Objected to as incompetent, irrelevant, and immaterial, and not confined to any definite time. Overruled. Exception.)

A. That was when we first talked about this thing?

364 Q. No, when you were at the place where the wreck occurred.

A. Phillips says, "If that fellow hits us now, our debts is paid."

Cross-examination by Mr. Halligan:

Q. Were you sleeping part of that time down there?

A. No, sir. I was just merely lying there and dozing off. I had a cravenette over my head to keep the snow off, and snow was coming into the corner there, and there was the conductor— (Interrupted.)

Q. Well, answer the question. Were you sleeping part of that time down there?

A. No, I was dozing off to sleep. I was just lying there in the corner.

A. Just dozing off?

A. Yes.

Q. What was it you had over your head?

A. A cravenette.

Q. A coat?

A. Yes.

Q. To keep the snow from blowing on to your head?

A. Yes, sir.

Q. And you say that when Cradit went out the first time he was gone a couple of minutes, you think?

A. Yes, sir.

Q. And you don't know where he went when he went out?

- A. Why, he went out to see what he could find out as to where we were.
- 365 Q. You don't know where he went.
- A. He started out to go up to the head of his train.
- Q. I am asking you if you know where he went when he went outside.
- A. No, sir. He got off the train.
- Q. But you don't know where he went, do you?
- A. No.
- Q. And you think he was gone about two or three minutes that time?
- A. Yes, sir.
- Q. You wouldn't be positive how long?
- A. Well, no, not to time it exactly, but I wouldn't judge any more than two or three minutes.
- Q. And the second time you think he was gone about five minutes?
- A. Yes, sir.
- Q. But you wouldn't be positive about that?
- A. No, not exactly positive.
- Q. It might be a little more or a little less?
- A. Yes, sir.
- Q. It might be two or three minutes more or two or three minutes less?
- A. No, sir.
- Q. It couldn't be that?
- A. No, sir.
- Q. But it might be a little more or a little less?
- A. Very little.
- Q. And you don't know what he did when he went out the second time?
- A. Yes.
- Q. Did you go out?
- A. No, sir.
- 366 Q. Will you tell the jury how then you know what he did, if you didn't go out of the caboose?
- A. Yes, sir.
- Q. Well, tell it.
- A. The Conductor says to him, "Take the south side of the train when you go."
- Q. And that is the reason you say *not* that he went to the head end?
- A. Yes.
- Q. And you think he was gone long enough to go to the head end of the train?
- A. No, sir.
- Q. And that is all you know about what he did or where he went, is what you heard the conductor tell him?
- A. Yes.
- Q. And so far as you know, he might have gone back of the train?
- A. Yes, sir.
- Q. Now, when did he say that he thought they were spacing?

A. When he came in the first time.

Q. How was it he said that?

A. He says, "If I thought that son of a bitch was spacing us, I would stop him myself." It was Cradit said that.

Q. If he thought that son of a bitch was spacing him?

A. Yes.

Q. He would stop him himself?

A. Yes.

Q. Who did you understand he had reference to?

A. The engineer that was following us.

Q. And you thought that he said that that was the fellow that was spacing them?

A. Yes, sir.

367 Q. What did you understand by the word "spacing"?

(Objected to as incompetent, irrelevant, and immaterial, and not the best evidence. Sustained. Exception.)

Q. But you do say that the expression he used was, "If I thought that son of a bitch was spacing us, I would stop him myself."

A. Yes, sir.

Q. And how did he say he would stop him?

A. I asked him, "How the hell would you stop him?" And he says, I would throw out a fusee, and he couldn't pass until it was burned out."

Q. And that was what he was to do to the fellow that was spacing him?

A. Yes.

Q. Now, you have got that conversation right, have you?

A. Yes, sir.

Q. You were not asleep there when you heard that?

A. No, sir.

Q. The facts are, you were not asleep any of the time?

A. No, sir, not what you would call exactly asleep. I was just lying there dozing off.

Q. Now, when you were at Dix, were you on the outside of the caboose?

A. Yes, sir.

Q. When did you go out on the outside?

A. I went out once while we were standing there.

Q. When was that that you went out?

A. That was about ten minutes after the stop.

Q. Was the conductor and brakeman there at that time?

A. No, sir, they were both out.

368 Q. Did you see either one of them while you were out there?

A. No, sir, I didn't stay out long enough to see them.

Q. Did you see the other train come in, 501?

A. I didn't see it come in, but I saw it standing alongside of us.

Q. Were they standing there while you were out?

A. No, that was after I went in again.

Q. They hadn't arrived?

A. No, not when I was out that time.

Q. About how long after you went in was it before they arrived?

A. Oh, it must have been a half an hour, or maybe more.

Q. And you don't know where the brakeman and conductor of the train were at that time?

A. No, sir, I don't.

Redirect by Mr. Ellick:

Q. Where did you have this coat that you refer to?

A. I had it partly on me, and then turned up this way on my head. (Indicating.)

Q. It was not over your head?

A. No, it was not over my head.

(Witness excused.)

369 V. A. WIRT, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. State your name.

A. V. A. Wirt.

Q. What is your occupation?

A. Chief dispatcher for the Union Pacific.

Q. Where do you reside?

A. Sidney, Nebraska.

Q. At what point are you the chief dispatcher?

A. Headquarters at Sidney, in charge of the Fourth District, from Cheyenne to Sidney.

Q. Were you in that position on the night of March 13th and 14th, 1913?

A. Yes, sir.

Q. Were you in the dispatcher's office on the evening of March 13th and the morning of March 14th?

A. Yes, sir.

Q. Were you receiving any messages from the operators over the line between here and Cheyenne?

A. I was not receiving any written messages.

Q. Who was doing that?

A. The operators in the telegraph office would receive any written messages.

Q. I mean, who was handling the operation of the trains?

A. Mr. Borton.

Q. And at what time does he go on duty?

A. Twelve o'clock, midnight.

370 Q. Were you there from midnight on?

A. Yes, sir.

Q. How are the orders transmitted governing the movement of the trains over that division?

A. Transmitted by telephone.

Q. Were you receiving or transmitting¹ any of those orders on that night?

A. None of the orders pertaining directly to the movement of the trains.

Q. Did you have a phone over which you could hear what messages were being transmitted over the phone?

A. I have a supplementary telephone on my desk connected with the same circuit as the dispatcher's phone.

Q. And were you using that phone for the purpose of ascertaining what messages were being transmitted?

A. I was using the phone quite frequently all night.

Q. Did any of the trainmen that you heard report to either Mr. Borton or to you that they were unable to see the block signals that night on account of the storm?

(Objected to for the reason that the question calls for a negative and not a positive answer. Overruled. Exception.)

A. No.

Q. Did you have any talk that night with Mr. McConaughy, the conductor of train 510?

A. Yes, sir.

Q. Did he tell you in that conversation that the storm was so severe that they couldn't see anything at Mile Post 426?

(Objected to as leading and suggestive and calling for a conclusion of the witness. Overruled. Exception.)

371 A. I had no conversation with Mr. McConaughy when he was at Mile Post 426.

Q. You didn't talk over the phone with him at Mile Post 426?

A. Not with Mr. McConaughy, no, sir.

Q. Did you talk over the phone with the operator at Mile Post 426 at the time that McConaughy was there and before the wreck?

A. All the conversation between the operator and this office at Sidney was carried on between the dispatcher and the operator.

Q. You didn't carry on any of that conversation?

A. No, sir, not with the operator.

Q. Were you listening over your phone at the time any conversation was had between the operator at Mile Post 426 and your dispatcher, Mr. Borton, during the time that McConaughy was at Mile Post 426 before the wreck?

A. I heard the conversation.

Q. In that conversation was anything said by Mr. McConaughy with reference to the storm being so severe that they couldn't see anything; or the operator, I mean, or anybody?

A. The operator gave us no information as coming from Mr. McConaughy.

Q. Did he give you any information with reference to the trainmen being able to see anything at Mile Post 426 before the wreck?

A. No, sir.

Q. Were you about the yards at Sidney there that night?

A. I was about the yards in the vicinity of the office, the hotel and the depot, but not beyond.

Q. Did you have an opportunity to observe the distance that you could see lights that night?

A. I did.

372 Q. What opportunities did you have for seeing lights?

A. I made it a point to keep myself posted in that respect by going outside with that object in view.

Q. And what did you find with reference to being able or not to see these signal lights?

A. The object that I was watching most was the two-arm semaphore west of the passenger station, near the water crane.

Q. From what point were you watching that semaphore?

A. From the platform in front of the train dispatcher's office.

Q. And how far was that semaphore from the point where you were watching it?

A. It is over three hundred feet.

Q. What is the fact as to whether or not you could see that signal each time that you looked at it?

A. I made at least four trips with that object in view between two o'clock and five o'clock, and at no time was I unable to see both lights or either of them in the semaphore in question.

Q. What was the color of those lights?

A. They were green until Extra 510 left Sidney. After that train left Sidney they were both in the danger position, or danger and caution, as the arms signified.

Q. What kind of a light would be displayed when they are in that position?

A. Red in the upper light and yellow below.

Q. Did you have occasion to look towards the stockyards?

A. I don't remember of looking in that direction.

Q. Were those lights on that semaphore a part of the automatic block signal system of the Union Pacific?

A. Yes, sir.

373 Q. After the wreck occurred did you make any tests with reference to the distance you could see a fusee?

A. Yes, sir, I made one test.

Q. Where was that test made?

A. Between the dispatcher's office and the buildings directly south, on the opposite side of the street to the track.

Q. How far would that be?

A. I didn't measure it, but it is more than a hundred feet.

Q. What time did you make that test?

A. That was about 4:30.

Q. After you had been advised of the wreck?

A. After I had been advised of the wreck.

Q. And what is the fact as to whether or not you could see a burning fusee that distance?

A. The light was very discernible at that distance.

Q. Were you acquainted with the manner in which engine 510 was to be picked up that night?

(Objected to as calling for a conclusion of the witness. Overruled. Exception.)

A. I was.

Q. Were you in the yards when Extra 510 started west?

A. I was.

Q. Were you in the office when you got the report that Extra 510 was out of water at Mile Post 426?

A. I can't say positively that I was in the office when that report was given, but I was immediately afterwards.

Q. Was there any particular reason why engine 510 should be picked up by Extra 504 instead of Extra 501 that night?

A. Yes, sir.

Q. What was the purpose of having Extra 504 pick up that engine instead of Extra 501?

374 A. Because it was reported to our office that Engine 510 was out of water, so nearly out of water that it would be doubtful if the engine could come to Sidney under her own steam. That made it necessary to move the engine as quickly as possible, because in the event that the 510 should not be able to move under her own steam it would be impossible to move the engine at all at the point where she stood, and in case the 510 was left in that condition we would have had an engine and six cars of hogs and thirty-five cars of high-class freight with a caboose tied up on one of our main lines to catch the snow; and in the event that the train stood there too long, with the wind from the north, it would of course drift the snow over on our other main line and block them both. It was therefore imperative that we move that train as quickly as possible, and engine 510 was the only engine available to move her own train at that time.

Q. Why do you say that it was necessary to make the movement of 510 at Mile Post 426 on its own power?

A. Because engine 510 was headed west. Any train moving that engine would have to couple on to the west end of it. That being the end of the double track, the only way to get that engine off of her own train on to the sidetrack would be for her to move under her own steam. Had the engine died there, it would be impossible for another engine to couple on the head of it, because of the pilots, which will not permit two engines to couple, each headed towards the other.

Q. Was there any further necessity for moving train 510 on account of any following train?

A. The train standing on the west bound main track would hold all following trains, including our train Number Seventeen
375 and train Number Three.

Q. And were those trains due shortly thereafter?

A. Number Seventeen was overdue, and Number Three would be due at Sidney before we could move the train otherwise.

Q. What trip would the engine 510 have to take before it would be prepared to pull its train westward?

A. It would have to return from Mile Post 426 to Sidney and do the necessary work in the yard to get to the water spout, and then return to Mile Post 426 and couple on to the train and pump up the air, before they could start the train.

Q. And how much longer time would have been consumed in that movement if directions had been given to have Extra 501 pick up that engine, and what would have been the result of that arrangement?

A. Had we waited for the 501 to pick up engine 510, it would have been necessary to wait until 4:10 A. M., in the first place, for the arrival of Extra 501. It would also have been necessary to hold the 501 with engine 510 at Mile Post 426 until Extra 504 had arrived at Sidney, because it was customary in storms of any nature, foggy or severe weather, as a matter of safety, to hold trains in that manner. That would have caused a delay of at least fifty minutes. It would have made it five o'clock before the engine could have left Mile Post 426.

Q. What is the fact as to whether or not you were observing that custom that night?

A. That custom was being observed.

(Plaintiff moves to strike out the question and answer as leading, suggestive, and a conclusion and calling for no fact. Overruled. Exception.)

376 Q. Were there other trains following 501 that night?

A. There were other trains following during the night, yes, sir.

Q. If engine 510 had died at the Mile Post before it was moved, what would have been its condition with reference to being available for use in transporting that train to which it was attached that night?

A. It would have been of no avail.

Cross-examination by Mr. Halligan:

Q. Now, you say that you were spacing trains that night, Mr. Wirt?

A. I wasn't spacing trains. It was being done.

Q. Where was it being done?

A. On the Fourth District, between Sidney and Cheyenne.

Q. Who was spacing them?

A. The train dispatcher.

Q. When did they begin to space trains that night?

A. Well, there was no definite hour as to that.

Q. But you were not spacing 501 and 504, were you?

A. We were spacing 501 and 504, yes, sir.

Q. How?

A. By holding 501 at Potter until 504 had arrived at Mile Post 426.

Q. Well, did you hold it at Potter until it had arrived at Mile Post 426?

A. Yes, sir. I did not, but the train dispatcher on duty did.

Q. Well, now, isn't it the rule in spacing trains that you hold one train at Potter until the other train clears that station?

377 A. Not necessarily.

Q. Well, isn't that what you call spacing trains?

A. Spacing trains is construed as I told you in answer to the former question.

Q. What was the benefit, then, of holding 501 at Potter and letting it go before 504 had gone by 426?

A. In order that we would know the exact location of the 504 when we permitted the 501 to move.

Q. Now, then you let 501 leave Potter before you got 504 past Mile Post 246, didn't you?

A. They left Potter before 504 left 426, yes, sir.

Q. Before they got by 426?

A. Yes, sir.

Q. And a collision occurred?

A. You are correct.

Q. Now, if you had got 504 by 426 before you let 501 out of Potter, would the collision have occurred?

(Objected to as argumentative. Sustained. Exception.)

Q. Well, wouldn't it have been better to have allowed 504 to have gone by Mile Post 426 before you let 501 out of Potter?

(Objected to as incompetent, irrelevant, and immaterial, not proper cross-examination, and not a proper test of the negligence of this company. Overruled. Exception.)

A. It is evident since the collision occurred that that would have been better.

Q. Now, then, you were being requested, were you not, by the trainmen to let 501 pick up that engine?

A. Do you mean by all of the trainmen?

Q. Some of them.

A. (No answer.)

378 Q. Answer my question. Didn't Mr. McConaughy request that 501 be allowed to pick up the engine?

A. No, sir.

Q. Didn't Mr. Zalesky request that 501 be permitted to pick up that engine?

A. No, sir, but he did request that— (Interrupted.)

Q. Now, then, didn't Mr. McManus request that 501 be permitted to pick up that engine?

A. No, sir.

Q. You didn't get any request that night, then, that 501 be permitted to pick up that engine?

A. We did get a request to let the following train pick up the engine.

Q. Who was that from?

A. It was through the operator on duty at Mile Post 426.

Q. How many times did he ask you that?

A. Once.

Q. Didn't he tell you that Mr. Zalesky requested that 501 be permitted to take up the engine?

A. The operator?

Q. Didn't the operator tell you that?

A. Mr. Zalesky requested through Mr. McManus through the operator that he be allowed to proceed without the engine.

Q. Well, the operator told you that, didn't he?

A. He did.

Q. Now, why did you think that he desired to be permitted to proceed without the engine?

(Objected to as incompetent, irrelevant, and immaterial. Sustained. Exception.)

Q. You refused to let him do it, didn't you?

A. I did, for good and sufficient reasons.

379 Q. And that was to save that engine there, was it?

A. To save the engine and keep our main tracks clear.

Q. And you got five men killed up there by it, too, didn't you?

(Objected to as incompetent, irrelevant, and immaterial. Sustained. Exception.)

Q. Did you consider, when you had that engine on your mind, that it was liable to die up there, that by letting 501 out of Potter before 504 cleared Mile Post 426 that there was liable to be a collision?

A. No, sir.

Q. You didn't consider that at all?

A. I didn't consider that there would be any danger of a collision. If I had, train 501 would never have left Potter.

Q. Now, why did you hold 501 at Potter until 504 got to Mile Post 426?

A. In order that we would know the exact location of Extra 504 East and could inform the train crew on 501 as to its whereabouts.

Q. And it was not on account of the severe weather at all and the difficulty of seeing signals?

A. That is the precaution that we use in case of storms.

Q. It was, then, because of the storm, the precaution that you used because of the storm, to hold 501 at Potter until the other train got to 426?

A. That was the reason that 501 was held, as an additional precaution in addition to Rule 99 and the block signal system.

Q. Now, then, if they could see the signals, that was not necessary, was it?

A. That is necessary because we have instructions to do it.

Q. Where is your rule with reference to that? I would like to see that rule, your instructions.

380 A. You will not find a rule in the rule book requiring us to space trains at all.

Q. Where is that rule?

A. That is in written instructions in letter form from our superintendents and our general managers and so on.

Q. When was that rule issued?

A. That rule has been of effect ever since I have been a railroad man.

Q. Wasn't there an additional rule afterwards issued with refer-

ence to spacing trains, after the wreck at 426 and at Gothenburg in that storm, a rule with reference to spacing trains?

A. No, there was not an additional rule issued. The attention of all concerned was brought to that original rule in that respect.

Q. By a bulletin that was issued from headquarters, wasn't it?

A. Yes, sir, our attention was called to it through a bulletin letter from headquarters.

Q. Now, have you got that letter with you?

A. No, sir.

Q. Can you produce it?

A. I am not certain that I can.

Q. What was the date of this letter that was issued, or bulletin that was issued with reference to spacing these trains after these wrecks occurred?

A. I don't remember the date of that letter.

Q. Will you get the letter?

A. No, sir.

Q. You won't bring it in here for us in court?

A. I can't promise to, because I am not sure until I look whether I can find it.

381 Q. Who issued that bulletin?

A. I think the superintendent issued it.

Q. Mr. Ware?

A. No, sir, Mr. W. R. Cahill, of Omaha. You could probably secure a copy of that letter from Mr. Cahill.

Q. Didn't you put that letter away for reference?

A. Yes, but that letter was submitted to all concerned for their perusal.

Q. What did you do with that letter when you got it?

A. I showed it to my train dispatchers.

Q. And then what did you do?

(Objected to as not proper cross-examination. Sustained. Exception.)

Q. Well, I will ask you to state as near as you can what was in that letter or bulletin.

(Objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination. Sustained. Exception.)

Q. I will ask you if that letter did not instruct dispatchers in case of storms to space trains and not to let one train out of one station until the train preceding it had cleared the next station in advance.

(Objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination. Overruled. Exception.)

A. I will not swear whether it did or did not instruct us entirely as you have quoted.

Q. Well, now, you are familiar with the rules, are you not?

A. Quite familiar, yes.

Q. And you are familiar with that rule?

382 A. I am familiar with the rule that requires us to space trains.

Q. Well, now, what is that rule?

A. I should say regulation or instruction. When we speak of a rule we speak of that which is included in the book of rules.

Q. Don't go into that. Just tell.

A. Our instructions are to space trains, and I have explained to you and the jury in what manner they were spaced on that night.

Q. Now, when shall you space trains?

A. During stormy or foggy weather.

Q. And how stormy or foggy must it be?

A. It rests altogether upon the judgment of the men in charge of the district.

Q. Now, as a matter of fact, it is not necessary when you can see the signals, is it?

A. We consider it necessary at all times to take all precautions in case of stormy or foggy weather.

Q. Is it necessary to space trains when you can see the signals clearly?

A. At what distance?

Q. The distance that they are placed on the track.

A. It is not necessary to space trains when you can see signals the distance they are supposed to be seen.

Q. And on this night you spaced trains because there was difficulty in seeing signals, did you not, and on account of the storm?

A. We spaced trains on account of the storm, yes, sir, because we have to operate the railroad all winter, you know.

Q. Since when has that been the custom?

A. Ever since I can remember.

Q. Now, you say you went out and looked at conditions at Sidney that night?

383 A. I took frequent observations, yes, sir.

Q. What time are you on duty ordinarily?

A. Ordinarily from about eight A. M. till six P. M.

Q. How did it come that you were on duty that night?

A. On account of the storm; because during a storm the train dispatcher is quite busy.

Q. Now, you went out and you took frequent observations, you say?

A. Yes, sir.

Q. Was it storming very much?

A. It was.

Q. Storming pretty hard, wasn't it?

A. Pretty hard.

Q. Did you ever see a worse storm in this country?

A. That can be construed in two different ways.

Q. Did you ever see a storm when the wind blew harder and there was more snow in the air?

A. I can't say that I did, as to the wind and the snow together.

Q. Now, where is the train dispatcher's office?

A. In the second building east of the main street down through the center of the city, on the tracks; the one-story building directly east of the hotel.

Q. And you think it was three hundred feet when you were observing the light in the block signal?

A. Yes, sir.

Q. And how many times did you go out?

A. I went out frequently during the night, and I went out at least four times between two and five o'clock.

Q. And could you see without difficulty that light at that distance?

A. I could see the position of the lights and note their indications.

384 Q. Did you have any difficulty in doing it?

A. No, sir, I saw them.

Q. Can a man on an engine that is running along at not less than twenty miles an hour, and from that to forty, see as well as a man that is standing on the ground still?

A. I never rode on an engine at that speed.

Q. Well, what is your judgment?

(Mr. Ellick: Objected to as incompetent, irrelevant, and immaterial, and because the witness has said that he is not qualified to answer it.

Mr. Wilcox: Then he is not qualified to hold his position.

Mr. Ellick: I object to that statement and except to it.

By the Court: The jury will not consider any statements made by counsel to each other. The objection is sustained.

Plaintiff excepts.)

Q. Now, you say you immediately went out and burned a fusee after the wreck?

A. Not immediately.

Q. How soon afterwards?

A. Well, it was probably about 4:30.

Q. Was that getting daylight then?

A. No, sir.

Q. And how far could you see it?

A. It was over a hundred feet to where I placed the fusee.

Q. Where did you place the fusee?

A. Immediately south of the office, across all the tracks, near the telephone poles.

Q. South of the office down here?

A. Yes, sir.

385 Q. Why did you do that?

A. I wanted to satisfy my own mind as to whether or not my employees on 504 had made any attempt to observe the rules.

Q. Well, if the employees on 501 had observed the rules, the accident would not have occurred there, would it?

A. I haven't heard the testimony.

Q. Well, don't you know without hearing testimony? If 501 had observed the rules, would they have run into 504?

(Objected to as incompetent, irrelevant, and immaterial, calling for a conclusion of the witness, not proper cross-examination, and argumentative.

By the Court: Sustained because it calls for a thing that is patent on its face. Exception.)

Q. You discharged Cameron for running into that train, didn't you?

(Objected to as not proper cross-examination. Sustained. Exception.)

Q. You sent engine 510 out too heavily loaded that night, did you not?

A. No, sir.

Q. It was not because of the load at all that she ran out of water?

A. I object to answering that question in the way it is asked.

Q. If the witness objects I will withdraw it. Where is your first water tank west of Sidney?

A. Potter, Nebraska.

Q. How many miles is that from here?

A. I believe it is sixteen miles.

Q. Well, don't you know?

A. I won't swear to the fractions. If you have a time card I will show you.

386 Q. Now, if engine 510 came into Sidney on 504, wouldn't they have to wait at Sidney until 501 arrived?

A. Yes, sir, but they would be ready to go on the arrival of 501?

Q. Now, under the condition of the weather, how long would that have taken? How long would it be after engine 510 left the train at 426 until it returned there?

A. That would have to be an estimate of course, but under ordinary conditions, had 510 been picked up by 504 as the instructions were put out, 504 would have left Mile Post 426 within fifteen minutes after their arrival there. They would have arrived at Sidney on the sidetracks here perhaps in forty-five minutes from that time, and 501 could have then left Mile Post 426 and it would possibly have taken them forty-five minutes to come to Sidney. Then 510 should have been ready to leave Sidney in at least one hour and thirty or forty minutes from the time that 504 left Mile Post 426 with 510.

Q. 510 would leave Sidney?

A. Yes, on the arrival of 501.

Q. But didn't you just say how long it would take 510 to leave Sidney and go back?

A. No.

Q. And how long would it take 510 to go back then to the train from Sidney?

A. From Sidney to Mile Post 426? Well, it would probably have taken them twenty or twenty-five minutes with their light engine.

Q. Wouldn't that train have been drifted up in that time just about as bad as ever it would?

A. I am afraid not.

387 Q. You don't think it would have drifted much in that storm?

A. It would have drifted some, but not as much as it would if it had staid there twenty-four hours.

Q. How long did it stay there?

A. I haven't the records with me to say exactly.

Q. About how long?

(Objected to as not proper cross-examination. Overruled. Exception.)

A. How long did the train 510 remain at Mile Post 426?

Q. That is the question.

A. Well, in order to answer that correctly I would have to have my train sheet.

Q. Well, was it drifted up there when it was taken out?

A. I think it was, but I am not in position to say, because I didn't leave Sidney.

Q. As a matter of fact, isn't that train there upon a raised track where it doesn't drift?

A. Yes, but the train itself forms a snow fence and the snow drifts over and about the train simply from the fact that the train is standing there.

Q. Won't the wind blow under the cars and carry it away?

A. Between the wheels perhaps, but wherever there is a wheel there will be a drift form, and being eight wheels on the car, that would make almost a solid drift.

Redirect by Mr. Ellick:

Q. You said you didn't consider that there would be any danger of allowing train 501 to leave Potter after you were aware that
388 train 504 had arrived at Mile Post 426. Why didn't
you consider that there would be any danger in that trans-
action?

A. Well, because I was personally acquainted with the crew on that particular train and considered that they would do their duty, which would protect their rear.

Recross-examination by Mr. Halligan:

Q. On which train?

A. On 504.

Q. Now, don't you know that the Burlington railroad tied up all trains on that night?

(Mr. Ellick: I object to that as being improper, and I except to that statement being made in the presence of the jury and ask that the jury be instructed to disregard it.

By the Court: Yes, it matters not that the Burlington was tied up, because there is no evidence that conditions were the same, and the jury will not consider it.

Plaintiff excepts.)

(Witness excused.)

389 W. A. BORTON, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

- Q. State your name to the reporter.
A. W. A. Borton.
Q. What is your business?
A. Train dispatcher.
Q. How long have you been a train dispatcher?
A. For the Union Pacific a year and a half.
Q. And how long have you been a train dispatcher altogether?
A. Seven years.
Q. And on what other road besides the Union Pacific?
A. The Burlington.
Q. What was your occupation before you became a train dispatcher?
A. I was telegraph operator and various occupations.
Q. How long were you a telegraph operator?
A. About five years.
Q. How long have you been engaged in the railroad business altogether?
A. Twenty-two years.
Q. Were you in the employ of the Union Pacific Railroad Company on the night of March 13th and 14th, 1913?
A. Yes, sir.
Q. In what capacity?
A. Train dispatcher.
Q. At what point?
A. Sidney, Nebraska.
Q. What division of the railroad did you have charge of as such train dispatcher?
390 A. The Fourth District of the Nebraska Division.
Q. What time did you go on duty that night?
A. At midnight.
Q. And how long did you remain upon duty?
A. Until eight o'clock in the morning.
Q. The following morning?
A. Yes, sir, the same morning.
Q. The morning of the 14th?
A. Yes, sir.
Q. Who in your office handled the telephone for receiving the reports and transmitting the orders from the different trains operating over that division?
A. I did.
Q. During the period that you were on duty?
A. Yes, sir.
Q. Did any of the trainmen during that period advise you that the weather conditions were such that they were unable to see the block signals?

(Objected to as incompetent, irrelevant, and immaterial under the issues in the case. Overruled. Exception.)

A. No, sir, they did not.

Q. Did Mr. McConaughy advise you that the weather conditions were such that he was unable to see anything at Mile Post 426?

(Objected to as leading and suggestive. Overruled. Exception.)

A. No, sir.

Q. Did you issue the order for train 504 to pick up engine 510?

A. Yes, sir.

Q. Were you advised by anyone that engine 510 was out of water at Mile Post 426?

391 (Objected to as leading and suggestive. Overruled. Exception.)

A. Yes, sir.

Q. And do you know about what time you received that advice?

A. Well, it was after three o'clock. I couldn't state without looking at the train sheet just what time it was.

Q. Was it before or after train 504 arrived at Mile Post 426?

A. It was just before. In fact, if I remember correctly, while I was talking to the engineer 504 came into Mile Post 426.

Q. What did you direct them to do with engine 510?

A. To pick her up and bring her to Sidney.

Q. What was your purpose of having train 504 pick up that engine instead of any other train?

(Objected to as immaterial. Overruled. Exception.)

A. The engine was reported as being almost out of water, and that made it necessary to get it to Sidney as soon as possible to keep it from freezing up; and if it had froze up out there it would have been of no use.

Q. And what would it have done to the traffic on the road

(Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception.)

A. It would have tied the railroad up, this end of it.

Q. And what effect would it have had in that kind of a storm?

A. Well, it would have meant a practical blockade of the east end of the railroad. It would have blocked one main track and left an important train standing out there for hours with six cars of livestock in it.

Q. What effect would that have, that train standing on that track, with reference to the snow gathering at that point?

(Objected to as immaterial. Overruled. Exception.)

392 A. Well in my opinion, if it stood there very long it would block the eastward track. It would have acted the same as a snow fence, because drifts would form on the south side of the train and block both of them.

Q. What do you mean by the opposite track?

A. The eastbound track.

Q. What is the fact as to whether or not it was necessary to make that movement at a time when engine 510 could move under its own power?

(Objected to as leading, suggestive, and argumentative. Overruled. Exception.)

A. There would have been no way of picking her up if she had died. The whole train would have had to be handled. The only way they could have got hold of her would have been to come across from Potter with a box-car or something ahead of the engine that was to pick her up. They can't couple the pilots of Union Pacific engines together. It would have been necessary to do that to send an engine out from Sidney to back in ahead of her and shove her in, or pull the whole train back. It would have made a bad mess.

Q. Were you aware that any of the trainmen were operating their trains over your district that night without observing the block signals?

(Objected to as incompetent, irrelevant, and immaterial, leading and suggestive, and argumentative. Overruled. Exception.)

A. No, sir.

Q. Were you aware that they were having difficulty in observing the block signals in operating their trains over the district that night?

393 (Objected to as leading and suggestive. Overruled. Exception.)

A. No, sir.

Q. Did you give the order for train 501 to leave Potter?

A. I gave the order, yes, sir.

Q. When did you give that order with reference to the time that you were advised that train 504 had arrived at Mile Post 426?

A. After 504 had arrived at Mile Post 426.

Cross-examination by Mr. Halligan:

Q. Train 504 had got to Mile Post 426 when train 501 called you up from Potter, had it not?

A. Yes, sir.

Q. And you told them that they were at Potter. What orders did you give them?

A. I didn't tell them that they were at Potter.

Q. I mean at 426.

A. Yes, sir.

Q. What were your orders?

A. Well, I gave them an order changing the meeting point there with Extra 510 West.

Q. Didn't you tell them that 504 was at Mile Post 426 and that their meeting point for 510 had been changed to the double track east of 426?

A. No, sir.

Q. What orders did you give them at Potter?

A. I gave them an order reading that "Extra 501 East will meet Extra 510 West on double track between Sidney and Mile Post 426."

394 Q. That was the order you gave?

A. Yes, sir.

Q. Now, you say you didn't know that they were having any difficulty in seeing the signals that night?

A. No, sir. I didn't know it.

Q. It never occurred to you that they were having difficulty that night?

A. No, sir.

Q. Did you know it was storming?

A. Yes, sir.

Q. Did you know it was a bad storm?

A. Yes, sir.

Q. Did you know that it is difficult to see signals in a bad storm?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. How long have you been a railroad man?

A. Twenty-two years.

Q. And you never learned that it was hard to see signals in a bad storm like you were having that night?

A. They can be seen. I have seen them in just as bad storms. I didn't have to strain my eyes either.

Q. And you never learned that it was hard to see these signals in a storm when it was storming as hard as it was on the night of the 13th?

A. No, sir. I have been in many of them.

Q. These storms like that are a common thing to you?

A. They occur occasionally.

Q. Well, you get six or eight of them every winter?

A. Oh, no; one or two.

395 Q. How many like that did you have last winter?

A. Two or three.

Q. How many the winter before?

A. I don't remember about the winter before.

Q. But you had seven or eight the winter before, didn't you?

(Objected to as repetition.)

Q. Didn't you have two or three anyhow the winter before like that?

A. Might have had, yes, sir.

Q. It wasn't anything very extraordinary about that storm?

A. Oh, it was a bad storm. I have seen just as bad, and been out all day in them.

Q. And whose duty is it to find out when they are having difficulty to see the signals in these storms?

A. If the trainmen can't see the signals, it is up to them to report the matter.

Q. Isn't there any duty on the dispatcher with reference to that?

A. The dispatcher keeps a record of his weather, under the instructions, and if the trainmen and enginemen are unable to see the signals, they are the ones that make the report.

Q. As a matter of fact, the dispatcher is the man who has control of the trains, is he not?

A. Yes, sir.

Q. Isn't it his duty also to ascertain whether the signals can be seen or not?

A. No, sir.

Q. Are you acquainted with that rule that the company has that they call "safety first" rule.

A. There is no "safety first" rule.

Q. What is that "safety first"?

396 (Objected to as not proper cross-examination. Sustained. Exception.)

Q. Well, isn't it the duty of the train dispatcher to always take the safe course?

A. Yes, sir.

Q. He is governed by rules to that extent, is he?

A. Yes, sir.

Q. And where there was any question of whether the enginemen could see the signals or not, then the dispatcher should take the safe course, shouldn't he?

A. Yes, sir. There wasn't any question that night. They didn't say anything about it.

Q. And dispatch his trains accordingly?

A. Yes, sir.

Q. And did any of the agents along the line report the conditions of the weather?

A. They reported weather conditions, yes, sir.

Q. Did they say anything about the storm?

A. Said it was storming, yes, sir.

Q. Did they say it was a hard storm?

A. Yes, sir, a hard storm.

Q. Snowing and drifting?

A. Snowing and blowing and drifting, yes, sir.

Q. And did you ask them whether there was any difficulty about seeing signals?

A. No, sir.

Q. As a matter of fact, you made no inquiry as to whether or not the trainmen were seeing the signals, did you?

A. No, sir, I had no chance to ask any of them.

Q. Now, you say you talked with Engineer Zalesky?

A. No, sir.

397 Q. Who was it you talked with?

A. I talked with Engineer Richardson.

Q. Did you talk with Engineer Zalesky?

A. No, sir.

Q. Did you talk with Brakeman McManus?

A. No, sir.

Q. Who did you talk with?

A. Talked with the operator at Mile Post 426.

Q. Did he tell you at any time that McConaughy was in there, and did he say to you, "McCon says they can't see anything"?

A. No, sir.

Q. And to let 501 pick up 510?

A. No, sir.

Q. How many people requested you to let 501 pick up engine 510?

A. One.

Q. Only one?

A. One person, yes.

Q. How many times did that one person request that?

A. Once.

Q. Who was that that requested it?

A. The operator at Mile Post 426.

Q. And you are testifying that the only request you ever got was from the operator at Mile Post 426 to have 501 pick up engine 510, and he only asked you that once?

A. Yes, sir.

Q. Who did he say requested it?

A. The engineer.

Q. What engineer?

A. Zalesky.

Q. That Engineer Zalesky requested that?

A. Yes, sir.

398 Q. Now let me refresh your memory and ask you if prior to that time that Engineer Zalesky requested that, Brakeman McManus had not been in there twice and asked you.

A. He came in there, Brakeman McManus came in and said that his engineer claimed he couldn't handle that engine. Well, he could have handled it.

Q. Didn't he ask you to let 501 pick up 510?

A. Yes, the operator asked me, through him.

Q. McManus asked you through the operator?

A. The operator was the only one that I talked to.

Q. Well, you knew that McManus had asked you once through the operator, didn't you?

A. Yes, sir, he asked me once through the operator.

Q. Didn't he ask you twice before Zalesky came in and asked you through the operator?

A. The second time there was any question about picking the engine up I turned the matter over to the chief operator, and had nothing more to do with it. I was using the telephone and telegraph both that night, and I let him settle it after the first request.

Q. That was the request from Brakeman McManus, was it?

A. Yes, sir.

Q. And then you turned it over to the chief dispatcher?

A. Yes, sir.

Q. And did you hear any other requests that came to the chief dispatcher? Were you on the same line of phone?

A. Well, I don't remember whether I had the telephone on my head or not; but if I did, I wouldn't hear all that was going on, because I would be listening to the telegraph instrument.

399 Q. Now, did you hear more than just the two requests, one from the brakeman through the operator, and one from Zalesky through the operator?

A. Well, if I remember rightly, they were all through the brakeman and to the operator, both of them.

Q. When was it you turned the matter over to the chief dispatcher? When the brakeman requested it?

A. Well, it was the second time they began to talk about it.

Q. Now I will ask you if prior to the time that 504 arrived at Mile Post 426 Mr. McConaughy didn't make a request through the operator to you.

A. No, sir.

Q. And didn't the operator say, "McCon says that it is storming and they can't see anything"?

A. No, sir, he did not.

Q. And to let 501 pick up 510?

A. No, sir.

Q. Nothing like that occurred?

A. No, sir, nothing like it while I was on the phone.

Q. Who did you give your orders to for 501 when it was at Potter?

A. Well, it proved eventually to have been the brakeman.

Q. Did you know at the time?

A. No, sir.

Q. Brakeman, what was his name?

A. McGinnis.

Q. Now I will ask you if Mr. McGinnis didn't tell you at that time that it was storming badly.

A. No, sir.

Q. Never said anything about the storm?

A. Oh, he may have said that it was storming or blowing, or something like that. I don't remember all that was said.

400 Redirect by Mr. Ellick:

Q. Did you give 501 any advices or instructions when it was at Potter with reference to 504 picking up 510?

A. Yes, sir.

Q. What did you advise them?

A. I told them that 504 was at the mile post picking up this engine, and to look out for them when they went down there; they might not be out.

Recross-examination by Mr. Halligan:

Q. Then you knew that when you let 501 leave Potter, that they might overtake 504 before it got out of Mile Post 426?

A. I didn't know it, no, sir.

Q. Well, you thought it was possible?

A. Yes, it was possible.

Q. And you felt it was so probable that you would tell them about it?

A. There was no probability about it. I simply told them that she was down there and might not be out before they got there, and to look out for her.

Q. Why was it necessary to tell them that if they could see the signals?

A. Well, I have done that in fair weather, just as bright a day as it is today, have a trainman on the phone and keep him posted as to what the man ahead of him was doing.

(Witness excused.)

401 V. A. WIRT, recalled as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. Ellick:

Q. How long have you been chief dispatcher for the Union Pacific Railroad Company at Sidney?

A. I have been chief dispatcher of this district since the first of February, 1912. We moved to Sidney from Cheyenne I believe about April 1, 1912.

Q. Were you chief dispatcher any other place before you came here?

A. Not permanently.

Q. What was your occupation before you became chief dispatcher here?

A. I was a train dispatcher.

Q. Where?

A. Omaha and Cheyenne.

Q. On what road?

A. Union Pacific.

Q. How long had you been a train dispatcher before you became chief dispatcher here?

A. About seven years.

Q. And what was your business before that?

A. I was a telegrapher and agent.

Q. And how long have you been engaged in the railroad business and connected with the moving of trains?

A. Practically fourteen years altogether.

Cross-examination by Mr. Halligan:

Q. You never have been a trainman, have you?

A. No.

402 Q. Never been out on an engine, running an engine in a storm like that?

A. No, I have never been running an engine.

Q. Now I will ask you if you will look for that bulletin and see if you can find it.

A. I will make a search for it, yes, sir.

Q. And bring it in if you find it?

A. Yes, sir. The one that was issued since the accident?

Q. Since the accident, and the one that was issued prior to the accident if you can find it; both of them.

A. Yes.

Redirect by Mr. Ellick:

Q. From what branch of the service do the dispatchers come?

A. Through the telegraph service. That is the only branch through which they can come as long as we have to depend on the telegraph partly.

(Witness excused.)

403 HARRY GILFOYLE, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. State your full name to the jury.

A. Harry Gilfoyle.

Q. And what is your occupation?

A. Railroad conductor.

Q. How long have you been in the railroad business?

A. Twenty-five years.

Q. With what company are you employed?

A. Union Pacific.

Q. How long have you been in the employ of the Union Pacific?

A. Twenty-five years.

Q. Over what portion of that road have you been employed?

A. Well, as a freight conductor about sixteen years, and the balance as a passenger conductor; over sixteen years between North Platte and Sidney, and the balance from North Platte to Cheyenne as a passenger conductor.

Q. Were you engaged in operating a train on the night of this storm, March 13th and 14th, 1913?

A. Yes, sir.

Q. What train did you have charge of that night?

A. Number Seven, the Los Angeles Limited.

Q. Is that one of the fast trains?

A. Yes, sir.

Q. A limited train?

A. Yes, sir.

Q. What time did that train arrive at Sidney that night?

A. 12:44 A. M.

404 Q. And was that train eastbound or westbound?

A. Westbound.

Q. What time did that train arrive at Potter that night, or didn't you take the time at Potter?

A. No, I didn't take the time at Potter.

Q. What time did it arrive at Dix?

A. 2:06.

Q. Did you meet and pass any trains at Dix?

A. Yes, there were two freight trains there.

Q. Do you know what they were?

A. One was 504, on the sidetrack; the other was 501, on the east-bound main track.

Q. Did you have occasion to observe that night on your trip, either at Sidney or while proceeding westward from Sidney, the signals?

A. You mean hand signals with a lantern or block signals?

Q. Either.

A. Well, at Sidney here I got train orders and went up to the engine and gave the orders to the engineer and compared time with him and told him to call in his flagman. He called him in, and I stood at the engine and received the flagman's signal, on the seven-car passenger train, to proceed.

Q. How was that signal transmitted?

A. By a white lantern; a hand signal.

Q. And where was the flagman when he gave you that signal?

A. At the rear end of our train.

Q. How many cars did you have on your train?

A. Seven cars.

Q. And what was the length of the cars on your train?

A. Well, the train would be about 490 or 500 feet long, with the baggage car on the end. That is taking about 65 or 70 feet
405 length to the car.

Q. Did you have an opportunity to observe any other signals west of Sidney?

A. Yes, we were stopped by a red block signal that governs the end of the double track at Mile Post 426.

Q. And where were you when you observed that block signal, with reference to the signal?

A. I was on the rear end of the train, the observation, where my flagman was.

Q. Where was the block signal with reference to your train when you observed it from the rear end?

A. Near the head end of our engine on the right-hand side.

Q. And could you see what the block signal indicated from where you were?

A. It indicated "stop"; a red signal.

Q. Where else did you have an opportunity to observe signals?

A. Well, at the order board at Dix. We called for that and got
a clear board.

Q. Did you stop at Dix?

A. No, sir.

Q. Where were you when you observed that?

A. Standing on the observation end of our train.

Q. And did you observe it before your engine reached the order board?

A. I was watching ahead and heard him when he called for it and saw it turn to green.

Q. And was that before your engine had reached the order board?

A. Yes, sir.

Q. From your experience as a railroad man, operating over this district during the number of years which you have testified, what do you say as to whether or not it was unsafe to operate
406 trains that night?

(Objected to because it is not a question for expert testimony. Objection withdrawn.)

A. I don't think it was unsafe. I have been out in just as hard storms.

Cross-examination by Mr. Halligan:

Q. How bad does a storm have to get, Mr. Gilfoyle, when it becomes unsafe to operate trains?

A. Whenever the storm gets so that you can't buck through it.

Q. How about the signals?

A. Well, I have never been in a storm yet but what I could see signals.

Q. But when the storm gets so bad that the track is all piled up with snow and you can't buck through, then you think it is time to quit?

A. I think it is time to quit then, yes, sir.

Q. And a storm never does get so bad but what you can see signals?

A. Well, I never saw any yet. Of course you couldn't observe them as well as in clear weather, but then you could observe them.

Q. Then this was not an unusually hard storm?

A. No, it was not cold. The snow was wet.

Q. But as to the wind blowing and snow flying?

A. The wind was blowing about thirty or thirty-five miles an hour.

Q. It was not an unusually hard storm?

A. I wouldn't judge it was.

407 Q. Were there any other storms as hard as that last winter?

A. Well, of course I couldn't recall.

Q. Do you remember any storm the winter before that was as bad as that one?

A. I don't remember.

Q. I will ask you, how many years has it been since you were out in as bad a storm as that one in March?

A. I don't know as it has been any years.

Q. You can't tell that?

A. No.

Q. Now, as long as you can see signals and see them clearly, it is safe to run trains, isn't it?

A. Well, you understand that a train proceeds with caution—
(Interrupted.)

Q. But as long as you can see signals, it is safe to run trains, isn't it?

A. With the train under control, yes, sir.

Q. As long as you can see signals clear it is safe to run trains?

A. Yes, sir.

Q. When there is danger that you cannot see signals, or it gets so bad, if it were possible for a storm to be so bad, that you couldn't see signals, would that be dangerous? I mean block signals.

A. No. I ran for years here without any block signals.

Q. Did you run under the same rules as you are running now with the block signals?

A. A very little change. If you can't see, follow a flagman.

Q. Do you think you could have seen that night to have followed a flagman?

A. If he didn't get too far ahead.

408 Q. How far ahead could he have been and you have seen him, with a white lantern?

A. I don't know. I know I could see the length of my train, seven cars.

Q. You could see right down here behind the hotel in Sidney, you mean?

A. Yes, but the storm would whirl around harder around the depot than in the open country; anybody would know that, where it whirls around a building.

Q. And you think it was storming harder right down here by the depot than in the open country?

A. I didn't say that. I said it whirled around the buildings harder.

Q. Well, you think it is harder to see a light down there than out in the open?

A. It certainly would be, where the suction of the snow was coming around in your face.

Q. Now, Mr. Gilfoyle, at the time that you saw this light down here by the depot, there were electric lights out there, were there not, along the depot?

A. Yes, sir.

Q. Electric lights along the hotel?

A. Yes, sir.

Q. And you were standing how far from the engine?

A. Standing right by the cab of the engine.

Q. And that was about 12:44?

A. That was 12:50 when I compared time with Mr. Hopkins.

Q. Now, you don't know how the weather was at 4:10, do you, at Mile Post 426?

A. No, because I was past that point.

409 Q. And you got to Dix at 2:06?

A. Yes, sir.

Q. And you don't look for the block signals on your train?

A. Not unless we are stopped, because a passenger conductor doesn't have that opportunity.

Q. What time did you get to Mile Post 426?

A. Arrived there at 1:20 and departed at 1:35.

Q. You were at Mile Post 426 fifteen minutes?

A. Yes, sir.

Q. And of course you don't know how the weather was there at Mile Post 426 at 4:10?

A. No, not at 4:10.

(Witness excused.)

WILLIAM A. HOPKINS, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. State your name.

A. William A. Hopkins.

Q. What is your occupation?

A. Locomotive engineer.

Q. By whom are you employed?

A. The Union Pacific railway.

Q. By whom were you employed on March 13th and 14th, 1913?

A. The Union Pacific railway.

410 Q. How long have you been a locomotive engineer?

A. About twenty-one years.

Q. How long have you been engaged in the railroad business?

A. Since 1892, excepting about two years.

Q. How long have you been in the employ of the Union Pacific?

A. All that time excepting about two years.

Q. Over what division of the Union Pacific have you been operating in that time?

A. The home district has been between Cheyenne and Sidney.

Q. And have you been operating a locomotive over that territory during that time?

A. Yes, sir.

Q. Were you operating a locomotive over that district on the night of March 13th and 14th, 1913?

A. Yes, sir.

Q. What train were you pulling that night?

A. Train Number Seven.

Q. And what is that?

A. That is the Los Angeles Limited, passenger train.

Q. What time did you leave Sidney, Nebraska?

A. At 12:55 in the morning of the 14th.

Q. 12:55 A. M., of March 14th?

A. Yes, sir.

Q. And how far did you pull your train that night?

A. To Cheyenne.

Q. Did you have any opportunities at Mile Post 426 to observe any hand signals?

A. I did.

Q. What was that opportunity?

A. When I approached Mile Post 426, the distance signal was against me and also the block controlling the position of
411 the switch. I called for the board and stopped and whistled out a flag. The brakeman went up to the box-car office, and I suppose it was he and the operator cleaned out the switch; and after the switch was over, lined up for me to go straight through, the block cleared and I received a hand signal from one of the two right at the box-car office.

Q. And how far was that from where you were on your engine?

A. It must have been in the neighborhood of 100 to 110 feet from where I was or from the point of my engine to where this signal was given at the box-car.

Q. You may state whether or not you observed all of the block signals between Sidney and Cheyenne on that trip.

A. I don't think that I missed any of them.

Q. What time did you arrive at Mile Post 426?

A. At 1:20 A. M.

Q. And what time did you leave there?

A. At 1:35 A. M.

Q. On the morning of March 14th?

A. Yes.

Q. Did your train stop at Potter, Nebraska?

A. No, sir.

Q. Did your train stop at Dix, Nebraska?

A. No, sir.

Q. Do you know what time you went by Dix, Nebraska?

A. It was a little after two o'clock; probably in the neighborhood of 2:20; something like that. It might have been a little later.

Q. On the same morning?

A. Same morning.

Q. Did you pass any trains at Dix, Nebraska?

A. There were two there.

412 Q. Did you meet and pass any trains at Dix?

A. I met two trains there.

Q. What trains were there?

A. The one on the siding was Extra 504. The other one, I didn't catch what it was, the one on the main line.

Q. What was the temperature that night?

A. I don't know exactly, but I judge that it was a few degrees below freezing.

Q. From what point on your engine did you observe the block signals on that trip?

A. On the right-hand side, the engineer's side of the cab.

Q. Through what window?

A. From Sidney to the Mile Post I had the side window open, and from the Mile Post on to Cheyenne I opened the front window and closed the side windows and looked straight through the front window.

Q. How were you dressed that night?

A. I had on my ordinary working clothes with a suit of overalls over it, and from the Mile Post west I had a coat on.

Q. Did you suffer any from the cold?

A. I can't say that I did. I was wet. The snow was very wet, and at the time I got up to Kimball and Pine Bluffs I was pretty well soaked, but from there on it was colder and the snow didn't melt on us so much.

Q. What *what* was the condition of the storm west of Pine Bluffs?

A. It was much colder, and the wind was blowing about the same as it had been down here, but there was very little snow.

Q. Are you acquainted with the block signals that govern the movement of eastbound trains as they existed on March 13th and 14th, 1913, between the east switch at Herdon and Mile Post 426?

413 A. Yes, sir.

Q. Was there a distance signal between the home signal at Mile Post 426 and the second home signal west of Mile Post 426?

A. Coming east?

Q. Coming east.

A. No, sir.

Q. Was there a distance signal between the east switch at Herdon and Mile Post 426?

A. Not coming east.

Q. Is there a distance signal in that territory governing west-bound trains?

A. There was at that time.

Q. Are you acquainted with Rule 99?

A. Yes, sir.

Q. That is the flagging rule?

A. That is the flagging rule.

Q. In view of your experience in this district and your knowledge of that rule and the rules of the company governing employees operating trains, and the weather conditions on the night in question, what do you say as to whether it was unsafe to operate trains over that district that night?

A. I don't consider that it was.

Q. If employees had observed the rules that were in force that night, could the trains have been safely operated without a block signal system?

(Objected to as leading and suggestive, and calling for expert opinion upon a question that the ordinary person can understand and determine from the rules of the company. Overruled. Exception.)

A. Yes, sir.

414 Cross-examination by Mr. Halligan:

Q. Now, Mr. Hopkins, if employees would always observe the rules of the company, collisions would not occur at any time, would they?

A. If employees would observe the rules that are laid down in the rules, they would not.

Q. There wouldn't be a collision?

A. That is what I mean.

Q. And it is because employees do not observe the rules, is it, that you have collisions on railroads?

A. Very likely it is a violation of some rule by some one.

Q. Now, you have a great many rules on the railroad, haven't you?

A. Well, we have several.

Q. Well, you have eight or nine hundred, haven't you, governing the operation of trains?

A. Well, there isn't that many.

Q. But you have got a great many rules, haven't you?

A. Oh, yes, there is quite a number. We admit that.

Q. Now, you say you left Mile Post 426 at about 1:35?

A. Yes, sir.

Q. And you arrived at 1:20. What were you doing at Mile Post 426 that time?

A. They were cleaning out the switch, and possibly taking and completing an order. I received an order there also.

Q. You lost fifteen minutes there?

A. Yes.

Q. Now, as you proceeded west the snow got less, didn't it, in the air?

A. Yes, sir.

415 Q. The facts are that this storm was not as bad up west of Pine Bluffs as it was this side, was it?

A. No, it was not, outside of the wind. The temperature was colder.

Q. And less snow?

A. Yes.

Q. And you don't know how the storm was at Mile Post 426 at about 4:10 that morning?

(Objected to as being self-evident. Overruled. Exception.)

A. I do not.

Q. And you don't know whether it would be possible for a man to see a block signal at Mile Post 426 along about four o'clock that morning?

(Objected to as being self-evident. Overruled. Exception.)

A. I do not.

Q. Did you lose any time in going from Sidney to Cheyenne on that trip?

A. I did.

Q. How much time did you lose between the two points?

A. Something over an hour.

Q. Now, from Sidney to 426 you observed the block signals at the side of your cab, through the side window of your cab?

A. Yes, sir.

Q. Did you have the side window open and looking out?

A. Yes, sir.

Q. And you had no difficulty at all in seeing those signals, did you?

A. Why, not any more than a person ordinarily would with the snow and wind beating in your face.

416 Q. Was it more difficult to see signals that night than ordinary?

A. Oh, yes.

Q. And from 426 you shut the side windows of your cab and opened the front window and observed the signals out through that way?

A. Yes, sir.

Q. Now, as you went up from Sidney to Mile Post 426, how far could you observe the block signals?

A. Well, that is hard to answer. There were times when a person could see them farther than others, on account of the currents of wind carrying the snow that it was picking up along there.

Q. And about what was the farthest distance you saw any of the signals that night between Sidney and 426?

A. I don't think that I could answer that correctly because we can't measure those distances very well; probably all the way from a hundred feet to possibly two or three hundred yards.

Q. From 100 feet to 900 feet that would be. Then you want to be understood that you could see those signals from 100 feet to 900 feet, going between Sidney and 426?

A. Well, I have only one place that could be stated definitely or anywhere near definitely in regard to the distance, and that would be on approaching 426.

Q. And how far did you see it there?

A. I saw the home signal, the one that governs the switch, about a quarter of a mile away from it. I was about half way between the distance signal and the home signal.

Q. That is, the block signal?

A. Yes, sir, the one that showed the position of the switch. The distance and that signal were about a half a mile apart, and I was about half way between them when I could see the position
417 of the signal and see the color of the light.

Q. Could you see the board at that distance?

A. I didn't notice the board at that time. I got up probably within a hundred yards of the signal, or something near that, and whistled for the board. In bad weather we generally pull up close to a station and then call for the board.

Q. And you could see the board then, could you?

A. I saw that I didn't get the board. The order board was not given me.

Q. Now, I don't understand railroading. That order board is in position of "stop" as you come up there, is it?

A. Yes, sir.

Q. That is, it is out straight?

A. Yes, sir.

Q. And as you came up you could see that the board didn't drop?

A. The board don't drop until I call for it. If they have no orders for me, they drop it.

Q. And you called for it how far from the depot?

A. Well, I was probably 150 yards away from it. I hadn't reached that home signal, because I stopped about a car-length east of the home signal.

Q. And you could see the board that distance?

A. I could see that board, and I saw that they didn't give it to me. That is why I stopped, because we can't pass them.

Redirect by Mr. Ellick:

Q. How were the weather conditions at Mile Post 426, when you were there, as compared with the weather conditions at Dix
418 when you went through Dix?

A. I believe the conditions were a little worse at Dix.

Q. Did you lose any time any other place on that trip at any point where you stopped any time?

A. Yes, I was at Kimball about thirty-five minutes—no, not quite thirty-five. I was at Kimball about twenty minutes, something like that, I guess.

Q. Any other point where you were delayed?

A. I was delayed at Pine Bluffs about twenty or twenty-five minutes, taking coal and water and picking up a helper.

Q. And you lost a little over an hour altogether on the entire trip?

A. Yes, a little over an hour.

Recross-examination by Mr. Halligan:

Q. About how fast were you running between Mile Post 426 and Sidney?

A. Well, I can't tell you as to that. I made no pretensions whatever of making time.

Q. Were you running thirty miles an hour?

A. No, I didn't.

Q. How far did you get west before you were able to make time, your usual time?

A. I could have made running time probably from Kimball to Cheyenne.

Q. But down here you couldn't make it?

A. I didn't attempt to down here.

Q. Why didn't you attempt to?

419 A. I had an order out of Sidney that Extra 510 would run ahead of Number Seven and Seventeen from Sidney to Potter, and I didn't know whether 510 had left Sidney or not, because Number Seven and Seventeen were supposed to be pretty close on time, I think, when that order was put out; and according to the rules I was not expected to make running time if I could have done so.

Q. Do I understand you that you left Sidney and you didn't know whether Extra 510 had left Sidney or not?

A. That is what I did.

Q. Didn't the dispatcher inform you that 510 had not left Sidney when you went out?

A. That didn't make any difference.

Q. I am asking you if the dispatcher informed you?

A. I didn't see the dispatcher at all.

Q. Who did you get your orders from?

A. From the conductor.

Q. When were you informed that 510 would run ahead of you to Potter?

A. When I read that order.

Q. Was the order from the conductor?

A. No.

Q. Who was the order from?

A. Issued by the dispatcher.

Q. And handed to you by the conductor?

A. Yes, sir.

Q. And were you on your engine at that time?

A. Yes, sir.

Q. Attached to your train, ready to pull out?

A. Yes, sir.

420 Q. And who was the order from? The dispatcher?

A. Yes, sir.

Q. And the dispatcher informed you then that Extra 510 would run ahead of you to Potter?

A. They delivered me that order.

Q. Who was that order signed by? What dispatcher?

A. I don't know.

Q. Was it the dispatcher on duty that night?

A. It certainly was.

Q. That was Mr. Borton, wasn't it?

A. No, sir, not as I understand.

Q. Did you get your order before he went on duty?

A. No.

Q. Well, was it Mr. Wirt?

A. It could not have been very well.

Q. But you are satisfied it was the dispatcher that was on duty that issued the order to you?

A. It had to be.

Q. And it was handed to you by Mr. Gilfoyle, your conductor?

A. Yes, sir.

Q. Mr. Gilfoyle was the conductor on your train that night?

A. Yes, sir.

Q. When did you ascertain that 510 had not left Sidney?

A. When I heard of the wreck.

Q. That was the first you knew that 510 had not gone out ahead of you?

A. I think it is.

Q. How far did you have to watch that night for Extra 510 West?

A. To Potter.

Q. Now, did you say you picked up a helper at Pine Bluffs?

A. Yes, sir.

421 Q. Is that usual?

A. No, sir.

Q. Where did that helper come from?

A. Cheyenne.

Q. And how long did you wait at Pine Bluffs for that helper?

A. The helper was there when I got there, I think. Well, I am satisfied it was.

Q. They had sent an extra engine out from Cheyenne to meet you and help you into Cheyenne?

A. Oh, no, not to meet me.

Q. How did the helper come to be at Pine Bluffs?

A. They had started it, as I understand—I can only give you what I understand—they had started it to help 510. 510 went to the bad, and they had it at Pine Bluffs and put it on Seven.

Redirect by Mr. Ellick:

Q. So that is not usual to send a helper out for your train?

A. No, not for any of the passenger trains.

Q. But they availed themselves of the use of that engine?

A. They used the engine that they had there with nothing for it to do. Seven was late, and they used it.

Q. When you got this order that 510 was ahead of your train, could any possible danger result when as a matter of fact 510 went out behind your train, from that order?

A. How was that?

Q. Conceding that you had this order that 510 was leaving Sidney ahead of your train, could the failure to advise you that 510 was not going to leave ahead of your train possibly result in any
422 danger?

A. No, sir.

Q. What is the distance between Sidney and Cheyenne?

A. 102 miles.

Q. And what is the running time of your train, or was at that time?

A. Three hours and forty-five minutes.

Recross-examination by Mr. Halligan:

Q. Mr. Hopkins, when you received this order to watch out for 510 West, or that 510 would run ahead of you as far as Potter, it gave you an additional train to watch out for, didn't it?

A. Yes, sir.

Q. And it was an extra burden upon your mind in running your train that night, to watch out for that train?

(Objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination. Overruled. Exception.)

A. I don't know that it can be considered a burden on the mind. I was attentive all the time.

Q. Yes, but it was one of the things that you had to consider in operating your train, wasn't it?

A. Well, it was one of the things that made me watch the blocks closely.

Q. And you started from here in that storm instructed that 510, a freight train, was ahead of you?

A. Well, I expected that it would be. You must remember that was only a helping order. It gave them the right to if they
423 wanted to use it.

Redirect by Mr. Ellick:

Q. If anything, it made you more cautious?

A. It made me observe the block signals more closely.

Recross-examination by Mr. Halligan:

Q. It would have been an additional provision of safety, wouldn't it, if the dispatcher had advised you that there — five or six trains ahead of you? It would have made you all the more cautious?

A. I don't think it would. I am pretty cautious as a rule myself.
(Witness excused.)

J. C. WILLIAMS, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. State your name.

A. J. C. Williams.

Q. Where do you live, Mr. Williams?

424 A. Cheyenne, Wyoming.

Q. How long have you lived in Cheyenne, Wyoming?

A. About twenty-three years.

Q. Where did you live before you lived in Cheyenne, Wyoming?

A. Sidney, Nebraska.

Q. How long did you live here?

A. About twelve years.

Q. What is your occupation?

A. Locomotive engineer.

Q. And by whom are you employed?

A. The Union Pacific.

Q. How long have you been in the employ of the Union Pacific?

A. Twenty-six years.

Q. How long have you been a locomotive engineer?

A. Fifteen years.

Q. Mr. Williams, what was your occupation prior to being a locomotive engineer?

A. Locomotive fireman.

Q. Over what division of the Union Pacific Railroad Company have you been employed during your service?

A. The Nebraska Division, Fourth District.

Q. And have you been engaged in operating an engine over that district for the last fifteen years?

A. Yes, sir.

Q. Were you engaged in operating a locomotive over that district on the night of March 13th and 14th, 1913?

A. Second Number Nine.

Q. And what is that train?

A. A mail train; mail and express.

425 Q. What time did you leave Sidney, Nebraska, that night?

A. 11:17.

Q. And what time were you at Kimball, do you remember?

A. 12:50 A. M.

Q. Did you have any opportunities to observe any hand signals or fuses that night at any place between Kimball and Sidney?

A. Why, we had an opportunity to observe the usual hand signals leaving Sidney.

Q. What does that mean?

A. After the regular inspection is made of the train, we call in

the flagman, and when he comes in he gives a signal and that is repeated to the engineer by the conductor.

Q. Who was your conductor that night?

A. Conductor Weir.

Q. Did you have any opportunity to observe any hand signal at any other place?

A. At Mile Post 426.

Q. What did you see at Mile Post 426?

A. When we arrived the operator didn't have the switch over, and we stopped at the block and the conductor went up to the switch, and after they got the switch over he gave a signal to come ahead.

Q. With what did he give you a signal?

A. A white lantern.

Q. How far from your position in the engine cab was he when he gave you that signal?

A. Oh, I should judge it was 150 or 175 feet.

Q. Did you have an opportunity to observe any fuses?

A. Somebody was burning a red fusee in front of the depot at Kimball.

426 Q. And from what distance did you observe that fusee?

A. Well, it was at the block signal east of Kimball, about a third of a mile, I should judge, from the depot.

Q. You saw it about a third of a mile?

A. I could see the reflection of it about a third of a mile from the depot.

Q. Do you know what train you passed at Kimball?

A. No, we didn't pass any trains, I don't think.

Q. Or meet a train at Kimball?

A. I think we met Extra 501. I didn't see it, but I think it was there.

Q. State whether or not you saw all the block signals between Sidney and Cheyenne on that trip that night.

A. Yes, sir.

Q. Are you acquainted with Rule 99, the flagging rule?

A. Yes, sir.

Q. From your experience as a locomotive engineer and as a railroad man over this district, and your acquaintance with the storm as you saw it on the night of March 13th and 14th, 1913, what do you say as to whether or not it was unsafe to operate trains that night?

A. No, sir, I don't think it was unsafe to operate trains.

Q. Were you acquainted with the block signals as they existed on March 13th and 14th, 1913, governing eastbound trains between the east switch at Herdon and Mile Post 426?

A. Yes, sir.

Q. And was there a distance signal in there any place?

A. No, sir.

Q. Was there a distance signal in that territory at that time governing westbound trains?

- 427 A. Yes, sir, there was a distance signal governing the east block at Herdon.

Cross-examination by Mr. Halligan:

- Q. You say you left Sidney, Mr. Williams, at 11:17?
A. Yes, sir.
Q. What were your orders when you left Sidney?
A. Why, I don't remember for sure, but we didn't have any orders that pertained to the movement of the train.
Q. Did you have any orders with reference to 510 West?
A. No, sir, we didn't know anything about it.
Q. You didn't have to watch for it?
A. No.
Q. Now, what time did you get to Mile Post 426?
A. At 11:36.
Q. And how long were you at Mile Post 426?
A. About fifteen minutes.
Q. And about what time did that storm commence?
A. Why, I couldn't say for sure, but it was along in the evening, I think, it began to snow.
Q. Along about dark?
A. Yes, sir, somewhere along there.
Q. And then the storm continued to increase in severity up until the time you left here, did it?
A. Well, I couldn't really say I was in the storm. I couldn't say anything about how the storm was.
Q. And you don't know what the weather conditions were at Mile Post 426 at about four o'clock in the morning, do you?
A. No, sir.
428 Q. You don't pretend to give any opinion on that?
A. No, sir.
Q. You had no difficulty in seeing the signals?
A. No, sir.
Q. You observed them from the side window of your cab all the way to Cheyenne?
A. Yes, sir.
Q. Did you lose time going up there?
A. Yes, sir.
Q. And what was the occasion of that?
Q. Well, it was on account of the storm principally.
Q. There was quite a heavy wind against you, was there not?
A. Yes, sir.
Q. From the northwest?
A. Yes, sir.
Q. What effect does that northwest wind, when it is blowing hard, have on the movement of a train?
A. Well, it makes a train pull harder. It is harder to pull against a wind.

Redirect by Mr. Ellick:

Q. You were not observing the conditions of the storm here in Sidney from a hotel office at 4:10 that morning, were you?

A. No, sir.

Recross-examination by Mr. Halligan:

Q. Where were you at about 4:10 that morning?

A. Cheyenne.

(Witness excused.)

429 GLENN E. MANN, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. State your name.

A. Glenn E. Mann.

Q. Where do you live, Mr. Mann?

A. North Platte, Nebraska.

Q. And what is your occupation?

A. Passenger brakeman.

Q. How long have you been a passenger brakeman?

A. Two years and a half.

Q. Were you in the employ of the Union Pacific on the night of March 13th and 14th, 1913?

A. Yes, sir.

Q. Were you engaged in assisting in the operation of a train on that night?

A. Yes, sir.

Q. What train?

A. Train Number Seven, the Los Angeles Limited.

Q. And who was your conductor?

A. Conductor Gilfoyle.

Q. What position did you occupy on that train?

A. Flagman.

Q. At the rear of the train?

A. Yes, sir.

Q. Your passenger crew, except the engineer and fireman, run from what point to what point?

A. From North Platte, Nebraska, to Cheyenne, Wyoming.

430 Q. And the engineer and firemen only run half that distance?

A. Yes, sir.

Q. Did you have an opportunity to observe any hand signals given at Sidney, Nebraska?

A. Yes, sir.

Q. What time was your train at Sidney?

A. Along here about 12:45.

Q. In the morning of March 14, 1913?

A. Yes, sir.

Q. When your train stopped at Sidney, what did you do?

A. Went back to flag.

Q. How far back did you go?

A. I went back between a quarter and a half a mile.

Q. Did you get any signal calling in the flagman?

A. Yes, sir.

Q. How was that transmitted?

A. Five blasts of the engine whistle.

Q. And what did you do in response to that signal?

A. Put down two torpedoes and a fusee and returned to my train.

Q. When you returned to your train, what did you do?

(Objected to as immaterial. Overruled. Exception.)

A. Gave a proceed signal.

Q. How did you give that signal?

A. With a white lantern.

Q. To whom did you give it?

A. Supposed to give it to the conductor.

Q. And where were you when you gave the signal?

A. At the rear end of the train.

Q. And how many coaches did you have that night?

A. Seven.

431 Q. Did you see the man who received your signal?

A. Yes, sir.

Q. Where was he standing with reference to your train?

A. Standing up, I should judge, between the baggage car and the engine.

Q. And what did you see up there that indicated to you that he had received your signal?

A. Well, I saw him communicate the same signal that I had given him.

Q. To whom?

A. To the engineer.

Q. And how did he communicate that signal?

A. With a white lantern.

Q. Did your train stop at Mile Post 426?

A. Yes, sir.

Q. What did you do when your train stopped at Mile Post 426?

A. Went back to flag.

Q. How far back did you go?

A. A half a mile.

Q. Do you remember the time that you were at Mile Post 426?

A. Yes, sir.

Q. What time?

A. 1:20.

Q. And did you remain back a half a mile from your train flagging until your train pulled out, or just before it pulled out?

A. I remained back there until they whistled me in.

Q. And when did they whistle you in with reference to the time that they pulled out?

A. Oh, I couldn't say exactly how long it was; a short time before.

432 Q. And then you returned to your train?

A. Yes, sir.

Q. Did your train stop at Kimball?

A. Yes, sir.

Q. And do you know about what time you were at Kimball.

A. Oh, we must have been there twenty or twenty-five minutes.

Q. And what did you do when your train got to Kimball?

A. Went back to flag.

Q. How far back did you go there?

A. A half a mile.

Q. And when did you return to your train with reference to the time that your train pulled out?

A. I returned when they whistled me in, a short time before they pulled out.

Q. How were you dressed that night?

A. A light overcoat and uniform the same as always.

Q. The ordinary cap?

A. No, I had on a cap that came down over my ears.

Cross-examination by Mr. Halligan:

Q. You say when the train stopped at Sidney you went back a half a mile?

A. Between a quarter and a half.

Q. Which was it nearer, in your judgment, a quarter or a half?

A. Well, it would have been nearer a quarter.

Q. And can you locate how far back you went by any of the objects there in the yard?

A. Yes, sir.

433 Q. What one?

A. The stockyards.

Q. You went back to the stockyards, did you?

A. The east end of the stockyards.

Q. And then they whistled you in and you came in?

A. Yes, sir.

Q. Is the flagman supposed to run in when he is whistled in that way?

A. He is supposed to jog along.

Q. As fast as he can go, isn't he?

A. Well, not run, necessarily, and break your neck. He is supposed to get in there in time.

Q. But as fast as you could go, isn't it? You are supposed to come in that way?

A. I don't know as you are supposed to come as fast as you can go.

Q. And that was about 12:45?

A. Yes, sir.

Q. Now, when you came in to the rear end of the train, you saw the man up at the head end that you thought was the conductor?

A. Yes, sir.

Q. By what light did you see him?

A. I saw him have a lantern in his hand.

Q. Well, there were other lights along there, were there not?

A. Yes, sir.

Q. Where was he standing there at that time with reference to the depot?

A. He must have been at the west end of the depot.

Q. And there are depot lights along there, are there not, at night?

A. Little incandescent bulbs, two or three of them.

434 Q. Do you know how many?

A. No, sir.

Q. There are quite a number, are there not, along there?

A. I couldn't tell you.

Q. You don't know?

A. No, sir.

Q. Well, there are enough there so as to light up the platform in front of the depot, are there not?

A. There is enough to give a little light there.

Q. Well, it gives a considerable light, doesn't it, under ordinary conditions?

A. Well, I wouldn't say.

Q. You go through Sidney right along here, don't you?

A. Yes, sir.

Q. And you can't tell how much light those lamps give?

A. No, sir.

Q. Do you think they assisted you to see the conductor there that night?

A. No, sir.

Q. They didn't help at all?

A. No, sir.

Q. All the light you got there was from the conductor's white lantern?

A. That is all I was looking for.

Q. And the lights upon the depot had no effect upon your ability to see the conductor?

A. I didn't use them for that.

Q. Answer the question.

A. No, sir.

Q. And when you got to Mile Post 426 what time was it?

A. 1:20.

435 Q. And you went back at Mile Post 426 a half a mile?

A. Yes, sir.

Q. You didn't go back a quarter, but you went back a half a mile?

A. I went back a half a mile.

Q. You went back a half a mile at 426?

A. Yes, sir.

Q. And was the wind blowing there?

A. A little bit.

Q. Just a little bit?

A. Yes, sir.

Q. Not very much?

A. Oh, it was blowing what you would call real hard.

Q. And it wasn't snowing much?

A. Snowing and blowing a little bit.

Q. You have — a great deal worse since than that, haven't you?

A. Well, I have seen some just as bad.

Q. Well, haven't you seen a great many a great deal worse?

A. I don't know as I have.

Q. Well, you don't mean to tell me that that was as bad a snow as you ever saw, do you?

A. I haven't seen very many bad ones.

Q. How long have you lived in western Nebraska?

A. Four years.

Q. During that time you haven't seen any worse snow storms than that was, have you?

A. No, sir.

Q. That was as bad as any you ever saw?

A. Just about the same as any I ever saw. I haven't seen very many snows.

Q. Well, you have seen all there have been here in four years?

A. I have seen all in two years.

436 Q. Where did you live before you came to western Nebraska?

A. I lived on the line between Virginia and Missouri.

Q. The line where?

A. The line of Missouri, down in the southern part of Missouri.

Q. Did you say the line between Virginia and Missouri?

A. Yes, sir, down there.

Q. I want to know where that line is, the line between Virginia and Missouri.

A. I don't know where it is.

Q. Now, I understood you to say that you had lived here four years.

A. Yes, sir.

Q. Where have you lived in the four years?

A. North Platte, Nebraska.

Q. You lived in North Platte for four years?

A. Yes, sir.

Q. And then you say that this snow storm up at 426 when you were there was as bad as any you have seen in that time?

A. Yes, sir.

Q. Was the wind blowing as bad?

A. No, sir.

Q. You have seen a great deal worse wind storms?

A. Yes, sir.

Q. And you went back a half a mile?

A. Yes, sir.

Q. And how long did it take you to come in when they whistled you in, to go that half-mile against the storm?

A. Well, I couldn't tell you.

Q. About how long?

A. Well, I couldn't tell you that.

437 Q. I want you to give your estimate about it.

A. Well, I am sure I couldn't tell you about how long I was coming in.

Q. Were you ten minutes?

A. I must have been ten minutes.

Q. Were you fifteen?

A. No, sir, I wasn't.

Q. The best of your judgment would be between ten and fifteen minutes coming in?

A. About ten minutes.

Q. About ten minutes it took you to come in?

A. Yes, sir.

Q. You traveled a half a mile against that storm in ten minutes?

A. Yes, sir.

Q. How long were you out there at that point protecting the rear end of your train?

A. Well, I couldn't tell you that.

Q. Were you there ten minutes?

A. No, I wasn't out ten minutes. I hadn't much more than got out there until they whistled me in.

Q. Were you out there five minutes?

(Objected to as repetition and immaterial. Sustained. Exception.)

Q. Now, where were you about four o'clock that morning?

A. I was up west. I couldn't tell you where I was at four o'clock.

Q. You don't know what the weather conditions were at 426 about four o'clock that morning, do you?

A. No, sir.

438 Redirect by Mr. Ellick:

Q. The worst wind that you saw was down at North Platte, was it?

A. I have seen worse winds here.

Q. Mr. Halligan wasn't in town then, was he?

A. I am sure I don't know.

(Witness excused.)

F. H. DOUGLAS, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. State your name.

A. F. H. Douglas.

Q. What is your business?

A. Freight conductor.

Q. Where do you live, Mr. Douglas?

A. Cheyenne, Wyoming.

Q. How long have you been a freight conductor?

A. Eleven years.

Q. How long have you been engaged in the railroad business?

A. Fourteen years.

Q. And over what division?

A. Over the Fourth District, Nebraska Division.

Q. Of the Union Pacific Railroad Company?

A. Yes, sir.

439 Q. Were you in the employ of the Union Pacific on the night of March 13th and 14th, 1913?

A. Yes, sir.

Q. Where were you on that night?

A. I was called to leave Sidney at 5:15 on the morning of the 14th.

Q. What time did you get up that morning?

A. About four o'clock, I believe.

Q. For what were you called, what service?

A. With the wrecker.

Q. To take the wrecker out to the scene of the wreck?

A. Yes, sir.

Q. Did you happen to be present in the yards at Sidney when Mr. Van Wirt was making a demonstration or test of a fusee?

A. Yes, sir.

Q. Did you see that fusee?

A. Yes, sir.

Q. From what distance from the fusee did you see it?

A. It was at least two hundred feet.

Q. Where were you at the time?

A. I was at the passenger depot.

Q. And where was the fusee?

A. Why, it was almost directly in front of the office, I should judge; about an equal distance between there and the Harper block across the street.

Q. What is the fact as to whether or not you could see the fusee burning?

A. I could.

Q. About what time was that?

A. Well, it was about 4:30, I should judge.

Q. In the morning of March 14th?

A. Yes, sir.

440 Q. Did you have occasion to go about in the storm at Sidney from the time you got up until you left?

A. I was out in it continuously.

Q. Where were you obliged to go?

A. Well, we were assisting in getting the cars assembled in the position that we wanted them, getting the engine out, and after that was ready we moved to the west end of the yard to get some laborers to assist at Mile Post 426 in clearing the wreck.

Q. Were you acquainted with the block signals between the east switch at Herdon and Mile Post 426, governing the movement of eastbound trains, as they existed on March 13th and 14th, 1913?

A. Yes, sir.

Q. State whether or not there was a distance signal between the east switch at Herdon and Mile Post 426 governing the movement of eastbound trains at that time?

A. There was none.

Cross-examination by Mr. Halligan:

Q. Where was the first block signal west of Mile Post 426 governing eastbound trains?

A. Well, there was a signal right at or near the office at Mile Post 426, and the next signal then would be the home signal at the east end of the Herdon passing track.

Q. And how far is that from 426?

A. One mile.

Q. Where was that fusee burned here in Sidney that Mr. Wirt burned?

441 A. Almost directly in front of the office.

Q. His office?

A. Half way between his office and the Harper block, or a slightly greater distance.

Q. And you were over at the depot?

A. I was at the passenger depot, coming from the caboose after I had been called.

Q. You were at the passenger depot, west of where the fusee was burned?

A. Yes, sir.

Q. Now, there is almost a continuous row of buildings along there, isn't there?

A. No, sir, it is clear space from the passenger depot across in the direction of the Harper block.

Q. I am asking if there is not a continuous row of buildings north of where the fusee was being burned, except the street that is between the hotel and the passenger depot?

A. Yes, there is the hotel.

Q. There is the passenger depot, and then there is the hotel, and then comes the office?

A. Yes, sir.

Q. You don't know what the weather conditions were at Mile Post 426, do you, at that time?

A. No, I was at Sidney.

Q. You don't know how they were up there?

A. It would be impossible for me to state.

Redirect by Mr. Ellick:

442 Q. What effect would these buildings have upon a snow storm attended by a wind coming from the northwest, with reference to your ability to see along the south side of those buildings?

A. It would be a detriment.

Recross-examination by Mr. Halligan:

Q. You think it is always a good deal worse on the south side of a building when there is a big blizzard coming from the north.

A. It has been demonstrated.

Q. And if a man wants to get in the clear when there is a big blizzard blowing, the place to go is on the north side?

A. If he doesn't want to be covered up with snow, that would probably be the best place to go.

Redirect by Mr. Ellick:

Q. You said that has been demonstrated. How has it been demonstrated?

(Objected to as immaterial. Sustained. Exception.)

Q. You are acquainted with the provisions of Rule 99, the flagging rule?

A. Yes, sir.

Q. From your experience as a railroad man in this district, and with that rule, what do you say as to whether or not it was unsafe to operate trains during the period that you had an opportunity to observe that storm?

A. Well, I don't think it was unsafe at all.

443 Recross-examination by Mr. Halligan:

Q. Just as safe that night as any other time?

A. Simply a little more precaution.

Q. But it was just as safe that time as at any time?

A. Yes, sir, on account of the protection that would be received.

Q. Now, if the engineer would observe the block signals, it would be safe, too, wouldn't it?

A. Yes, sir.

Redirect by Mr. Ellick:

Q. How about the flagman observing the rules with reference to trains?

(Objected to as repetition. Sustained. Exception.)

(Witness excused.)

MARION ROSEBOOM, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. State your name.

A. Marion Roseboom.

Q. Where do you reside?

A. Cheyenne, Wyoming.

444 Q. What is your occupation?

A. Locomotive engineer.

Q. On what railroad?

A. Union Pacific railroad.

Q. How long have you been a locomotive engineer?

A. Twelve years.

Q. How long have you been engaged in the railroad business?

A. Sixteen years.

Q. In what territory have you been employed while engaged in that business?

A. On the Fourth District of the Nebraska Division of the Union Pacific railroad.

Q. Were you in the employ of the Union Pacific on March 13th and 14th, 1913?

A. Yes.

Q. Where were you on that night?

A. I was at Sidney.

Q. Were you called upon for any service that night?

A. I was called for 5:15 A. M., on the morning of the 14th.

Q. What time did you get up that morning?

A. About 4 A. M.

Q. What time did you get outside into the weather?

A. About 4:10 or 4:15.

Q. Did you have any opportunity to observe and signals around the yards here that morning?

A. Not particularly so, except the home and distance signal west of the passenger station.

Q. And from what point did you see that signal?

(Question withdrawn.)

Q. What time was it when you saw this block signal?

A. About 6:15 A. M.

445 Q. Were you acquainted with the block signals governing the movement of eastbound trains as they existed between the east switch at Herdon and Mile Post 426 on March 13th and 14th, 1913?

A. Yes, sir.

Q. Was there a distance signal between those points at that time governing the movement of eastbound trains?

A. No, sir.

(Witness excused.)

F. H. DOUGLAS, recalled as a witness on behalf of the defendant, testified as follows:

Cross-examination by Mr. Halligan:

Q. Mr. Douglas, you were in charge of the wrecker when you went to Mile Post 426?

A. Yes, sir.

Q. And what time did you leave here?

A. At 6:30 in the morning.

Q. And what time did you arrive at 426?

A. 7:55.

Q. And how long was it after you arrived there before you began work on clearing up the wreck?

(Objected to as not proper cross-examination. Sustained. Exception.)

446 Redirect by Mr. Ellick:

(Defendant's Exhibit 2 is identified.)

Q. I call your attention to Defendant's Exhibit 2 and ask you if you know what that is, more particularly with reference to the form.

A. Yes, sir.

Q. For what is that form used?

(Objected to as immaterial. Overruled. Exception.)

A. It is a form that is required by the company to be filled out when they make application for positions.

Q. When persons make application for positions with the company, that is the form the company uses for them to fill out?

A. Yes, sir.

(It is stipulated by the parties that that portion of Defendant's Exhibit 2 which is in writing, as distinguished from being printed, extending from the top of Defendant's Exhibit 2 down to and including the signature of Charles M. Cradit, is in the handwriting of Charles M. Cradit, the deceased, and that the signature hereinbefore referred to is the signature of Charles M. Cradit.)

Q. Were you acquainted with the rules of the company as they existed during the year 1910?

A. Yes, sir.

Q. What is the fact as to whether the rules as they existed then, that is, governing trainmen and the conduct of trainmen, were the same as they were on March 13th and 14th, 1913, with the exception of that last paragraph of Rule 99 that was referred to before during this trial?

A. Yes, sir, they were the same.

447 (Defendant offers Exhibit 2 in evidence. Objected to as incompetent, irrelevant, and immaterial. Objection overruled. Exception. Exhibit 2 is read to the jury by Mr. Ellick. Defendant is given permission to withdraw Exhibit 2 and furnish copy thereof.)

(Witness excused.)

JOHN McCLANEGHAN, called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct examination by Mr. Ellick:

Q. State your name.

A. John McClaneghan.

Q. What is your business?

A. Manager of the stockyards.

Q. Where do you reside?

A. Sidney.

Q. Were you in Sidney on the night of March 13th and 14th, 1913?

A. I was.

Q. What were you doing that night?

A. Taking care of some sheep at the stockyards.

Q. Were you giving those sheep your personal attention?

A. Yes, sir.

Q. During what portion of that night were you outside, about the stockyards and railroad yards?

448 A. Well, about all the time.

Q. How are your stockyards lighted?

A. Electric lights.

Q. What kind of lights?

A. Electric lights.

Q. Arc lights?

A. No, just common sixteen-candle-power globes.

Q. Incandescent lights?

A. Yes, sir.

Q. Did you have an opportunity of observing those lights from any particular distance?

A. Yes, sir.

Q. From what point?

A. Well, I don't hardly understand what you mean.

Q. From what point away from your yards did you observe those lights? Were you up at the dispatcher's office?

A. Yes, I was there several times in the night.

Q. State whether or not you could see the lights at your yard from the telegraph office.

A. Up until two o'clock in the morning, or a little after two, I could see them from the telegraph office.

Q. And what other opportunity did you have for observing those lights after two?

A. In the work in the yards.

Q. Were you working around the yards after two o'clock?

A. Yes, sir.

Q. And until how late in the morning were you up?

A. I was up all the time. I didn't go to bed.

Q. How far was it from the telegraph office to the stockyards?

A. It is over a quarter of a mile.

449 Cross-examination by Mr. Halligan:

Q. Now, that storm continued to increase in severity through the night, did it not, Mr. McClaneghan?

A. Yes, sir.

Q. Continued to up until morning?

A. Up until about nine o'clock was the worst of the storm.

Q. About what time did the storm begin?

A. Well, as near as I can remember, I think the wind changed to the northwest about eight o'clock in the evening.

Q. How soon after that did it begin to snow?

A. It had been snowing before that.

Q. And this was about two o'clock that night when you saw these lights?

A. Well, that is the last time that I could see them plainly from the telegraph office.

Redirect by Mr. Ellick:

Q. How large are those yards at Sidney? I mean the territory that the lights cover.

(Objected to as immaterial. Sustained. Exception.)

(Witness excused.)

(It is stipulated by the parties hereto that Mr. Wirt, the witness who was on the stand yesterday, would testify if present that he has made search for the papers that he agreed and was requested to search for, and that he is unable to find them.)

450 JOHN McCLANEGHAN, recalled as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. Ellick:

Q. What was the last time you said that you were at the dispatcher's office?

A. A little after two in the morning.

Q. Did you go then from the dispatcher's office to your yards?

A. Yes, sir.

Q. And in going from the dispatcher's office to your yards did you observe whether you could see the lights in your yards?

(Objected to as incompetent, irrelevant, and immaterial, too remote from the place where the wreck occurred, and too early in time. Question withdrawn.)

Q. Did you go home at any time that morning?

A. Yes, sir.

Q. What time did you go home?

A. About four o'clock.

Q. How far is your home from the yards?

A. I guess, as near as you could get at it, it would be a quarter of a mile.

Q. State whether or not you could see the lights from your home at that time?

A. Yes, sir.

Cross-examination by Mr. Halligan:

Q. See what lights?

A. At the stockyards.

451 Q. You could see the stockyards lights from your home?

A. Yes, sir. I was at the upstairs window and could see them from there.

Q. How many lights have you over there?

A. I think about twenty-two.

Q. And how close are they together?

A. About fifty feet.

Q. When you say you could see those lights from your home, how could you see them? Could you see each individual light, or could you just see an illumination there in the night?

A. I could see a few of the lights that were closest to my house.

Q. And the balance was just an illumination?

A. The balance I would have been unable to see any, because the ground slopes and the lights disappear from view.

Q. Which way do you live from the *sotekyards*?

A. Southwest.

(Witness excused.)

Defendant rests.

Plaintiff rests.

452 (Both parties having rested their case, the defendant at this time moves the court to instruct the jury to return a verdict for the defendant for the following reasons:

1. The petition does not state facts sufficient to constitute a cause of action.

2. The evidence adduced by the plaintiff is not sufficient to sustain a cause of action against this defendant.

3. The evidence as adduced by the plaintiff shows that the death of Charles M. Cradit was due solely and exclusively to his own carelessness and negligence.

4. The evidence of the plaintiff shows that the death of the said Charles M. Cradit resulted from dangers and risks which the said Charles M. Cradit had assumed.

5. For the reason that the evidence of the plaintiff shows that the death of the said Charles M. Cradit was due solely and exclusively to dangers and risks which the said Charles M. Cradit is shown by the evidence to have assumed.

6. That the evidence of the plaintiff fails to sustain or support the allegations of negligence set forth in plaintiff's petition.

Motion overruled. Defendant excepts.)

453 (Plaintiff moves the court to strike from the record the testimony of the witnesses Cameron and Long with reference to an alleged conversation had on their engine with Phillips in the presence of Cradit, for the reason that the same is incompetent, irrelevant, and immaterial under the issues in this case. Overruled. Plaintiff excepts.)

454 *Copy of Plaintiff's Exhibit A.*

Letters of Administration.

THE STATE OF NEBRASKA,

Cheyenne County, ss:

The People of the State of Nebraska to Charles M. Hadley of our said County, Greeting:

Whereas, Charles M. Cradit lately departed this life intestate, being at, or immediately prior to his death an inhabitant of the County of Cheyenne in the State of Nebraska and having, while he

lived, and at the time of his decease, estate within our said County of Cheyenne to be administered, by means whereof the ordering and granting administration of all and singular the goods, chattels, rights, credits, and estate whereof the said deceased died possessed in the State of Nebraska, and also the auditing, allowing, and final discharging the account thereof, doth appertain unto our County Court for our said County of Cheyenne; and we, being desirous that the goods, chattels, rights, credits and estate of the said intestate may be well and faithfully administered, applied and disposed of, do grant unto you, the said Charles M. Hadley full power, by these presents, to administer and faithfully dispose of according to law, all and singular the goods, chattels, rights, credits and estate of said deceased, within the State of Nebraska, which shall at any time come to your possession, or to the possession of any other person for, you, and to ask, gather, levy, recover and receive all the goods, chattels, rights, credits and estate whatsoever of said deceased, which to him while he lived, and at the time of his death did belong, and to pay and discharge all debts and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by
 455 our said County Court; hereby requiring you to make and return to our said Court, within three months, a true and perfect inventory of all the goods, rights, chattels, credits and real estate of said deceased, which shall come to your possession or knowledge, or to the possession of any other person for you, and also to render a just and true account of your administration to our said Court within one year, and at any other time when required by our said Court, and to perform all orders and decrees of our said Court by you to be performed in the premises. And we do, by these presents, depute, constitute, and appoint you, the said Charles M. Hadley administrator of all and singular the goods, chattels, rights, credits, and estate of the said Charles M. Cradit deceased.

In testimony whereof, we have caused the seal of our said County Court to be hereunto affixed.

Witness the hand and seal of our County Judge for our said County of Cheyenne, at Sidney, in said County, the 13th day of June in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.]

HENRY E. GAPEN,
County Judge.

STATE OF NEBRASKA,
Cheyenne County, ss:

I, Henry E. Gapen, County Judge in and for Cheyenne County, Nebraska, do hereby certify that the within and foregoing is a true and complete copy of the Letters of Administration issued to Charles
 456 M. Hadley, the 13th day of June, 1913, at the same appears on file and of record in my office in said County.

In testimony whereof I have hereunto subscribed my name and affixed my official seal at Sidney, this 13th day of June, 1913.

[SEAL.]

HENRY E. GAPEN,
County Judge.

Endorsed: County Court. Estate of Charles M. Cradit, Deceased.
Letters of Administration.

Copy of Rule 508 Offered in Evidence from Plaintiff's Exhibit B.

(Page 260, Bill of Ex.)

"508—An engineman of a train entering a block as provided for by these rules will be held responsible in case of accident caused by overtaking the preceding train."

Copy of Plaintiff's Exhibit C.

(Admitted in Evidence, Page 374.)

The Western Union Telegraph Company.

13 OM F 63 Collect 1 Ex.

SUPERIOR, WIS., Aug. 29, '13.

De Foe and Swanson, Sidney, Neb.:

Your wire rec'd was about to leave for Winnipeg as I have
457 a good offer there as Locomotive Engineer if you want me at
trial wire me immediately before I accept this position at
Winnipeg and wire me at once one hundred and eighty five dollars
expense account and I will be at your service and settle rest of ac-
count later.

HERBERT W. CAMERON, *Engineer.*

3:26 P. M.

Copy of Def. Ex. 2.

Application for and Record of Examination.

Location and Date, Cheyenne, ——— 14, 1910. Examiner's No. —.

— Division.

1. What is your name in full, age, present occupation, and what experience have you had in Railroad service?

Answer: My name is Charles M. Cradit. Aged 29. Present occupation is brakeman and have had — years experience in railroad service, in the capacities and on the roads below stated.

Name- of Roads.	Occupation.	No. of Years.
.....	Brakeman.	3 years' train service.

2. Have you a copy of the Rules and Regulations of the Transportation Department of the *yes* Union Pacific Company, effective Aug. 1, 1907.

Answer: Yes. Produces copy No. 7126 for verification by examiners.

458 3. Have you studied carefully said rules and particularly those pertaining to the duties of a brakeman?

Answer: Yes.

4. Do you thoroughly understand them, and are you now prepared to be examined on said rules?

Answer: Yes.

5. Do you promise and agree that during your employment you will obey and conform to these rules and regulations?

Answer: Yes.

I certify that I have personally read the above questions and answers, and that all things therein stated are true.

(Signed)

CHARLES M. CRADIT.

NOTE.—The above must be filled out and signed in the presence of the examiners.

This is to certify that we have this day thoroughly examined the above named C. M. Cradit upon his above written application, and as to his having possession of, acquaintance with, and a clear and correct understanding of the Rules and Regulations of the Transportation Department of the U. P. R. R. Company, effective Aug. 1, 1907 and find him *qualified for the position of brakeman.

Remarks:

Date Nov. 18, 1910.

Certificate No. 15372.

Issued Nov. 18, 1910.

*(Qualified.)

(Not qualified.)

(Signed)

O. W. BRANDT,

Board of Examiners.

Endorsed: No. 6723. Examination for position of — 19—,

459 STATE OF NEBRASKA,
Lincoln County, ss:

I hereby certify that the within and foregoing is a true transcript of the oral and documentary evidence adduced or offered on the trial of the within entitled cause, together with all the objections made, the grounds therefor, and the rulings thereon, at the regular September, 1913, term of the District Court held in and for Cheyenne County, Nebraska.

P. J. BARRON,

Official Reporter.

Received this Bill of Exceptions containing pages from 112 to 507 both inclusive for examination and amendment this 15th day of

December, 1913, and returned the same with the following amendments and suggestions thereto:

DEVOE & SWENSON,
WILCOX & HALLIGAN,
Attorneys for Plaintiff.

I hereby certify that the foregoing Bill of Exceptions contains all the testimony introduced or offered by the plaintiff and defendant on the trial of the within named cause, together with all the objections interposed, the grounds therefor, the rulings thereon, and the exceptions taken thereto. And I hereby approve, sign, and settle the same as the Bill of Exceptions of said cause in said court.

H. M. GRIMES,
*Judge of the Thirteenth Judicial
District of Nebraska.*

No. Platte, Neb., 12/19-1913.

460 STATE OF NEBRASKA,
County of Cheyenne, ss:

I, H. T. Doran, Clerk of the District Court, Thirteenth Judicial District of the State of Nebraska, in and for said county, do hereby certify that this is the original bill of exceptions filed in my office in the cause in said court, wherein Charles M. Hadley, Administrator of the Estate of Charles M. Credit, deceased, is Plaintiff, and Union Pacific Railroad Company, is defendant.

Endorsed: 18439. Hadley v. Union P. R. Co. Bill of Exceptions. 1913.

[SEAL.]

H. T. DORAN, *Clerk.*

Endorsed: 18439. Hadley v. Union P. R. Co. Bill of Exceptions. Supreme Court of Nebraska. Filed Dec. 29, 1913. H. C. Lindsay, Clerk.

Endorsed: Filed December 22, 1913. H. T. Doran, Clerk District Court.

461 And on the same day there was filed in the office of the clerk of said supreme court a certain *Præcipe*, in the words and figures following, to-wit:

STATE OF NEBRASKA:

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Credit, Deceased,

v.

UNION PACIFIC RAILROAD COMPANY.

Præcipe.

To the Clerk of said Court:

Please docket the enclosed transcript of record as an appeal from a judgment rendered on the 8th day of October, 1913, in a certain

cause in the District Court of Cheyenne county, wherein Charles M. Hadley, as Administrator of the Estate of Charles M. Cradit, deceased was Plaintiff, and Union Pacific Railroad Company was Defendant,

You will designate the above named Union Pacific Railroad Company as Appellant, and Charles M. Hadley, as administrator of the Estate of Charles M. Cradit, deceased, as Appellee.

Issue notice of appeal for above named Appellee.

MILES AND MCINTOSH,
EDSON RICH,
A. G. ELLICK,

Attorneys for Appellant.

Endorsed: General No. 18439. Supreme Court State of Nebraska. Hadley v. Union Pacific R. Co. Præcipe. Supreme Court of Nebraska. Filed Dec. 29, 1913. H. C. Lindsay, Clerk.

462 And on the same day there was made to issue out of the office of the clerk of said supreme court a certain Notice of Appeal, in the words and figures following, to-wit:

Notice of Appeal.

THE STATE OF NEBRASKA, ss:

To the Sheriff of the County of Cheyenne:

You are hereby commanded to notify Charles M. Hadley, as administrator of the estate of Charles M. Cradit, deceased that an appeal has been taken to the Supreme Court of the State of Nebraska by Union Pacific Railroad Company asking the reversal of a judgment against it rendered on the 8 day of October A. D. 1913, in a certain cause in the District Court of Cheyenne County, wherein Charles M. Hadley, as administrator of the estate of Charles M. Cradit, deceased, was Plaintiff, and Union Pacific Railroad Company was Defendant.

You will make due return of this notice, on or before thirty days after the date hereof.

Witness my hand and Seal of said Court, at the City of Lincoln, this 29 day of December, 1913.

[SEAL.]

H. C. LINDSAY, *Clerk*,
By VICTOR SEYMOUR, *Deputy*.

Endorsed: General No. 18439. Supreme Court State of Nebraska. Hadley v. Union Pacific R. Co. Notice of Appeal. December 29, 1914, fixed as Rule Day, as provided for under Rule Nine. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 3rd day of January, 1914, said Notice of Appeal theretofore issued out of the office of the clerk of said supreme court was returned and filed in the office of said clerk with service thereof acknowledged, in the words and figures following, to-wit:

Service of the within Notice of Appeal acknowledged this 30 day of December, 1913.

CHARLES M. HADLEY,
Administrator, Appellee,
By DEVOE & SWENSON AND
WILCOX & HALLIGAN,
Attorney.

Endorsed: Supreme Court of Nebraska. Filed Jan. 3, 1914. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 28th day of September, 1915, there was filed in the office of the clerk of said supreme court a certain Stipulation, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

General No. 18439.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY, Appellant.

Stipulation.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that an order may be entered herein by the above court extending the rule day and the time within which appellant shall be required to serve its brief upon counsel for the appellee until October 1st, 1915.

Dated August 25th, 1915.

464

DEVOE & SWENSON,
By J. M. SWENSON,
Attorneys for Appellee.
EDSON RICH,
Attorneys for Appellant.

Endorsed: General No. 18439. In the Supreme Court of the State of Nebraska. Charles M. Hadley, Administrator of the estate of Charles M. Cradit, deceased, Appellee, vs. Union Pacific Railroad Company, Appellant. Stipulation Supreme Court of Nebraska. Filed Sep- 28, 1915, H. C. Lindsay, Clerk.

465 That on the 28th day of September, 1915, there was filed in the office of clerk of the said supreme court by the said appellant, Union Pacific Railroad Company, fifteen printed briefs, as required by the rules of said supreme Court, and the following is a true and correct copy of the assignments of errors contained in said appellant's brief and of Paragraphs I, VI, VII, VIII and XI of the argument in appellant's said brief and which paragraphs are the

ones thereof mentioned in appellant's praecipe directed to the clerk of said supreme court in the appeal herein to the United States supreme court, to-wit:

466

Errors Relied Upon for Reversal.

1. The verdict of the jury and the judgment of the court are contrary to law.

2. The verdict of the jury and the judgment of the court are not sustained by sufficient evidence.

3. The court erred in overruling the motion of the defendant made at the conclusion of all of the evidence in the case to instruct the jury to return a verdict in favor of the defendant.

4. The damages awarded by the jury are excessive and appear to have been given under the influence of passion.

5. The damages awarded by the jury are excessive and appear to have been given under the influence of prejudice.

6. The judgment is excessive and is based upon a verdict given under the influence of passion.

7. The judgment is excessive and is based upon a verdict given under the influence of prejudice.

8. The second special finding of the jury is contrary to law.

9. The second special finding of the jury is contrary to the instructions of the court.

10. The second special finding of the jury is not sustained by the evidence.

11. The third special finding of the jury is not sustained by the evidence.

12. The court erred in giving to the jury on its own motion instruction number one, which is as follows:

"The Court instructs the jury that in this action the plaintiff brings suit against the defendant and for cause of recovery the plaintiff alleges in his petition that Charles M. Cradit departed this life on March 14, 1913; that on June 13, 1913, the plaintiff was duly appointed administrator of the estate of said Charles M. Cradit, and that he duly qualified as such administrator and is now the duly acting and qualified administrator of said estate.

467 That the defendant, the Union Pacific Railroad Company, is a corporation organized and existing under the laws of the State of Utah and is engaged in the business of common carrier by railroad through Nebraska, Colorado, Wyoming, and Utah, and was so engaged on March 13th and 14th, 1913.

That on said days said Charles M. Cradit was employed by and worked for defendant as a brakeman, residing in Sidney, Nebraska.

That on March 13th and 14th, 1913, a blizzard raged between Sidney and Cheyenne, Wyoming.

That the wind blew with such velocity that a man could not walk and make any headway against it, heavy snow was falling and drifting so that one could not see more than fifty feet through it, and by reason of such storm it was dangerous to run trains closer than the distance from one telegraph station to another on said railroad.

That the trains on defendant's railroad between Sidney and Cheyenne on March 13th and 14th, 1913, were operated and controlled by a train dispatcher at Sidney who knew the condition of the weather and the dangers in operating trains in such weather.

That the said brakeman, Charles M. Cradit, left Cheyenne at about 6:10 P. M. on March 13th as rear brakeman on the freight train known as Extra 504, loaded with freight consigned to various stations outside of Wyoming and east of Cheyenne.

That it was raining and snowing when deceased left Cheyenne, and the said storm continued to increase as the said train proceeded east; that when said train reached Dix, a station on defendant's road, said train was upon a side track, and the condition of the weather and the difficulty of proceeding with said train in safety was reported to W. A. Borton, the train dispatcher at Sidney, by Ray C. Phillips, the conductor of said train.

That while at said station of Dix, freight train known as Extra 501, bound east, came in on the main track beside the train of the deceased, all of which was known to the train dispatcher at Sidney.

468 Plaintiff further alleges that said Dispatcher, W. A. Borton, with full knowledge of the weather and the dangers incident to operating trains in such a storm as was then on, wilfully, carelessly, and negligently ordered train Extra 504 to proceed east to Sidney, and immediately thereafter wilfully, carelessly and negligently ordered train Extra 501 to proceed east to Sidney following in close proximity to said train Extra 504.

Plaintiff further alleges that G. D. Sage is an officer of defendant and known as Assistant Superintendent of the defendant's road between Sidney and Cheyenne, and had charge, as such officer, of the making up and sending out of trains from Sidney to Cheyenne.

That on the morning of March 14, 1913, said Sage was in Sidney, knew the severity of the storm than raging, knew the dangers of operating trains in such a storm as was then raging, yet he wilfully, carelessly, and negligently ordered train known as Extra 510 to be made up and proceed west from Sidney to Cheyenne on defendant's road; that said train was a freight and left Sidney at 1:10 A. M. on March 14, 1913.

That because of the severity of the storm said train consumed one hour and fifty-five minutes going from Sidney to Mile Post 426, a distance of about eleven miles, that when said Extra 510 arrived at said Mile Post 426 the engine was out of water and was compelled to abandon the train; that the dispatcher at Sidney was so notified by the engineer.

Plaintiff alleges that at that time Mile Post 426 was the end of the double track on defendant's said road; that there was at that time a telegraph station with a telegraph operator then located at said Mile Post and said dispatcher, W. A. Borton, was notified of the condition of the engine drawing Extra 510 by the operator at said Mile Post; that said dispatcher ordered train Extra 504 to stop at said Mile Post, to pick up said engine and bring it with his train to Sidney, well knowing that he ordered Extra 501 East to follow Extra 504 into

469 Sidney, and knowing that said trains were running in close proximity to each other and that it was difficult for the men operating the trains to see, give and take signals, because of the storm then raging.

Plaintiff alleges that James Zalesky, who was engineer of train Extra 504, running east, then reported to the train dispatcher the condition of the weather, the difficulties in giving and taking signals, and asked said dispatcher to be permitted to come on to Sidney without picking up the engine on train Extra 510, and the dispatcher refused such permission and ordered said engine to be brought to Sidney with train Extra 504.

Plaintiff further says that at said time in March defendant had on its road what is known as block signals, by which a red light is always displayed in the rear of each moving train at various distances therefrom, but such distance as to enable the engineer of one train following another to stop before striking a train in front.

That the rules of defendant prohibited the running by a red signal or passing a signal that did not show green.

That on the night in question there was a signal to the rear of train Extra 504 at sufficient distance to enable the engineer of train Extra 501 to stop before colliding with train Extra 504.

That in taking the train Extra 501 East from Potter to Mile Post 426 the defendant carelessly and negligently proceeded without the conductor of the train.

That by so carelessly running, said train Extra 501, without a conductor, without a head light, and without observing the signals, carelessly and negligently ran into the rear of train Extra 504, destroying and demolishing the caboose attached to said train, and thereby causing the death of the said Charles M. Cradit, who was in said caboose at the time of said collision.

470 Plaintiff alleges that said Charles M. Cradit at the time of his death was thirty-one years of age, sound in body and mind, temperate and industrious, and was capable of earning and was earning \$110.00 per month; that he left surviving him his wife, Edith Cradit, and two children, Violet B. Cradit, age five years, and Grace Cradit, age two years; that said wife and children were wholly dependent upon the said Charles M. Cradit for their support and maintenance, and by reason of his death being caused by defendant's said alleged negligence and carelessness they have sustained damages in the sum of \$50,000.00, and for whose benefit this action is brought and for which sum the plaintiff asks judgment."

13. The court erred in giving to the jury on its own motion instruction number five which is as follows:

"The gist of plaintiff's action is that the death of Charles M. Cradit was caused by the negligence of the defendant Railroad Company in the operation of its trains on its tracks at or near what was called Mile Post 426 on the night of March 13 and 14, 1913.

Facts which are alleged by one party and admitted by the other in the pleadings do not require any proof; so that the negligence of the defendant, and that such negligence was the cause of the injury to Charles M. Cradit that resulted in his death, and that his death

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was not the result of his own negligence, are among the decisive questions for you to pass upon in this case.

It rests upon the plaintiff to prove by a preponderance of the evidence the facts necessary for his recovery; that is, that the death of Charles M. Cradit resulted from an injury inflicted upon him by the defendant Railroad Company in the negligent and careless operation of its railroad in running its trains at the time and place set out in the petition.

If the plaintiff establishes this fact by a fair preponderance of the evidence, then the burden will rest upon the defendant to establish by a fair preponderance of the evidence that the negligence and
471 carelessness of the said Charles M. Cradit was the proximate cause of the injury that resulted in his death, or that his negligence contributed to his injury and death."

14. The court erred in giving to the jury on its own motion instruction number six, which is as follows:

"This action is brought under what is called the Employers' Liability Act, a law passed by the United States Congress, which law provides that every common carrier by railroad, while engaged in commerce between any of the several states, shall be liable in damages to any person suffering injury while he is employed by such carrier, or in case of the death of such employee to his personal representative for the benefit of the surviving widow and children of such employee, for such injury or death, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, or other equipment.

That in all actions brought against any such common carrier by railroad, under this act, to recover damages for personal injuries, or where such injuries result in his death, the fact that such employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

15. The court erred in giving to the jury on its own motion instruction number ten, which is as follows:

"If, under the evidence and these instructions, you find for the plaintiff, then I charge you that the measure of the damages, the amount plaintiff is entitled to recover, is such sum as will compensate the widow and minor children of the deceased Charles M. Cradit, in whose behalf the plaintiff sues, for the pecuniary loss, if any, that they may have suffered by reason of the death of said Charles M. Cradit, less such sum, if any, you find such damages should be diminished by reason of contributory negligence on the part of the
472 said Charles M. Cradit. The law does not permit the recovery of remote or speculative damages, or damages as punishment.

In determining what the amount of the recovery should be, you are entitled to take into consideration the occupation of the deceased, his earning capacity at his occupation, and the reasonable probability, as shown by the evidence, of his future earnings; and in this connection you are entitled to consider the Carlisle Tables of Expectancy in-

produced in evidence and showing the reasonable expectancy of life of a healthy person of the age of thirty-one years to be 33 and 68/100 years."

16. The court erred in giving to the jury on its own motion instruction number fourteen, which is as follows:

"Testimony has been received in the trial of this action showing that acetylene lights used on engines 501, 504, and 510 went out; that when the acetylene lights went out, lighted white lanterns were placed in the head light of the engine and used in the place of the acetylene light; the difficulty of seeing the block signals and other signals used; the snow in the air and the velocity of the wind.

All this evidence was received, not as evidence of any negligence on the part of the defendant company, but as facts and circumstances to aid the jury to determine from this evidence, together with all the other evidence shown during the trial, the severity of the storm at the time and place of the accident or wreck."

17. The court erred in giving to the jury on its own motion instruction number fifteen, which is as follows:

"It is a question of fact for you, Gentlemen of the Jury, to determine from the evidence, whether the injury that caused the death of Charles M. Cradit was because of the negligence of the defendant company.

The defendant company acts by its agents and employees, and is chargeable with the results of its agents and employees in the management and operation of its trains. The presumption, in the absence of any evidence, is that neither party was negligent or careless; 473 that the defendant company and its employees exercised reasonable care, prudence, and consideration for the employees engaged in the management and running of its trains; also that the deceased, Charles M. Cradit, used like care, prudence and consideration to protect himself and avoid injury while employed by defendant in the operation of its trains. This presumption continues as to both the deceased and the defendant until the contrary is shown by the evidence.

The degree of care required of the defendant in protecting the deceased from injury was the adoption of all reasonable means and precautions to provide for the safety of the deceased while he was engaged in his employment, and this degree of care is to be measured by the dangers to be apprehended or avoided.

The defendant was under obligations to not expose the deceased, in conducting its business, to perils or hazards which the defendant could have guarded against by proper diligence.

The engineer on train 501, the dispatcher and assistant superintendent at Sidney, all represented the defendant in their respective stations, and any failure upon their part, or upon the part of either of them, in the exercise of such reasonable diligence, caution and foresight as an ordinarily prudent man would exercise under similar circumstances to guard the deceased from injury, was negligence of the defendant.

In determining the question of the defendant's negligence, if any, it is competent for you to consider the character and severity of the

storm at the time and place of the collision; the block signals maintained by defendant to give warnings of danger; the ability of persons to see signals by lantern, fusees, and torpedoes; the orders, if any, that were given by the dispatcher and the assistant superintendent at Sidney, or by either of them; the knowledge, if any, that either the dispatcher or the assistant superintendent has as to the severity of the storm; of the ability or inability of the train men to

474 see the block signals and other signals at the time they gave any orders as to the running of the three trains in question, if they or either of them gave any orders; the degree of diligence or lack of diligence they are shown to have exercised to avoid injury to the deceased; that care or lack of care on the part of the engineer running train Extra 501 to see train Extra 504 and avoid running into it.

On the part of the deceased, it is competent for you to consider his opportunities to discover and avoid the danger to which he might be exposed; his conduct in the matter of precaution or lack of precaution in flagging the train he was on, to avoid its being run into by train Extra 501, and thereby avoid danger. In short, you will consider all the facts and circumstances shown in the testimony bearing upon the conduct of the defendant and the deceased.

If, upon consideration of all the testimony, you find that the injury which caused the death of Charles M. Cradit was the proximate result of the negligence of the defendant or its employees, then you should find for plaintiff as directed in instruction No. 10."

18. The court erred in giving to the jury on its own motion instruction number sixteen, which is as follows:

"As one of its defenses the defendant pleads what is known and called assumption of risk. You are instructed as a matter of law that a servant or employee assumes the ordinary risks and dangers incident and peculiar to the employment upon which he enters, but he does not assume any risk or dangers due to the master's or employer's negligence, nor does he assume risks or dangers arising from sudden, unforeseen circumstances, not ordinarily incident to his employment.

The employee relies, as he has the legal right to do, upon the presumption that due care will be exercised by each employee to avoid injury to himself, and by each employee to avoid injury to his co-employees.

475 In this case, when the deceased accepted his employment as brakeman for the defendant company he assumed all the risks and hazards incident and peculiar to the business of brakeman in the business of operating and running trains and handling cars by the defendant company in its business of carrying on interstate commerce by railroad.

It is for you, Gentlemen of the Jury, to determine from all the evidence in this case, from all the facts and circumstances shown on the trial, whether or not the injury and death of the deceased, Charles M. Cradit, was because of the risks and hazards incident and peculiar to the employment in which he was engaged.

If, from all the evidence, you find that the injury and death of the

said Charles M. Cradit was due to and the result of the risks and hazards incident and peculiar to the business of brakeman in the operation and running of trains, then plaintiff cannot recover herein; and if you so find, you will return a verdict finding for the defendant.

19. The court erred in giving to the jury on its own motion instruction number seventeen, which is as follows:

"In coming to any conclusion in this case the jury should be governed by the evidence introduced before you, and by that alone. You will disregard entirely any remarks by counsel not warranted by the evidence. The evidence is what the witnesses were permitted to testify while on the witness stand, and not what any counsel or the court may have stated their recollection of the evidence was. You have no right to indulge in speculations, conjectures or inferences that are not supported by the evidence.

Each juror may apply to the subject before him that general knowledge which any man may be presumed to have; yet, if he be personally acquainted with any material or particular fact or facts, he is not permitted to mention the circumstance to his fellow jurors. If any juror knows any particular fact or facts material to the issues in this case, it is his duty, while sitting as a juror, during the trial and deliberating on this case, to keep and remain silent in relation thereto.

476 So far as there is a conflict in the evidence, it is your sole duty to reconcile it if you can; or if you cannot to determine which is true and which is untrue, and you are to give such weight to the testimony of any witness as you deem it entitled to under all the circumstances of the case.

Take this case, and from all the facts and circumstances of the case, shown during the trial, return such a verdict as you believe to be just and right."

20. The court erred in refusing to give to the jury instruction number one requested by the defendant, which is as follows:

"You are instructed to return a verdict for the defendant."

21. The court erred in refusing to give to the jury instruction number two requested by the defendant, which is as follows:

"You are instructed that plaintiff has failed to sustain by sufficient proof the allegation in the petition that Train Dispatcher, W. A. Borton, was negligent in ordering Extra 501 East to follow Extra 504 East from Dix, Nebraska, to Sidney, Nebraska, and in close proximity to Extra 504 East, and you are, therefore, instructed that you cannot base any verdict in this case against the defendant upon that allegation of negligence."

22. The court erred in refusing to give to the jury instruction number three requested by the defendant, which is as follows:

"You are instructed that the action of the defendant in permitting Extra 501 East to leave Potter on the night of the wreck before Extra 504 East left Mile Post 426 was not the proximate cause of the death of Charles M. Cradit and, you are, therefore, instructed that you must not base any verdict against the defendant in this case upon that action."

23. The court erred in refusing to give to the jury instruction number four requested by the defendant, which is as follows:

"You are instructed that the evidence of the plaintiff is not sufficient to show any negligence on the part of G. D. Sage, Assistant Superintendent at Sidney, Nebraska, in ordering Extra 510 West to proceed west from Sidney, Nebraska, at 1:10 A. M. on March 14, 1913, and you are, therefore, instructed that you must not base any verdict against the defendant upon that action."

24. The court erred in refusing to give to the jury instruction number five requested by the defendant, which is as follows:

"You are instructed that the evidence shows that the action of G. D. Sage, Assistant Superintendent at Sidney, Nebraska, in ordering Extra 510 to proceed west from Sidney, Nebraska, at 1:10 A. M. March 14th, 1913, was not the proximate cause of the death of Charles M. Cradit, and you are, therefore, instructed that you must not base any verdict that you might return against the defendant in this case upon that action."

25. The court erred in refusing to give to the jury instruction number six requested by the defendant, which is as follows:

"You are instructed that the plaintiff failed to show that there was any negligence on the part of the defendant by reason of the action of W. A. Borton, Train Dispatcher, at Sidney, Nebraska, in ordering Extra 504 East to pick up the engine of 510 West at Mile Post 426, and you are, therefore, instructed that you must not base any verdict against the defendant in this case upon that action."

26. The court erred in refusing to give to the jury instruction number seven requested by the defendant, which is as follows:

"You are instructed that the act of the defendant in ordering Extra 504 East to pick up the engine of Extra 510 West at Mile Post 426 was not the proximate cause of the death of Charles M. Cradit and you are, therefore, instructed that you must not base any verdict in this case against the defendant upon that action."

27. The court erred in refusing to give to the jury instruction number eight requested by the defendant, which is as follows:

"You are instructed that the plaintiff herein has failed to show any negligence upon the part of the defendant in failing to take on the Conductor of Extra 501 East at Potter, Nebraska."

28. The court erred in refusing to give to the jury instruction number nine requested by the defendant, which is as follows:

"You are instructed that the absence of the conductor of Extra 501 East from his train after it left Potter, Nebraska, was not the proximate cause of the death of Charles M. Cradit, and you are, therefore, instructed that you must not base any verdict that you might find against the defendant in this case upon that fact."

29. The court erred in refusing to give to the jury instruction number eleven requested by the defendant, which is as follows:

"You are instructed that the evidence fails to show that the defendant herein was guilty of any negligence toward Charles M. Cradit in running by signals with Extra 501 East at the time of the wreck."

30. The court erred in refusing to give to the jury instruction number eighteen requested by the defendant, which is as follows:

"You are instructed that the evidence in this case shows that the death of Charles M. Cradit resulted from the dangers and risks which were assumed by him and that, therefore, the plaintiff cannot recover in this case."

31. The court erred in refusing to give to the jury instruction number twenty-one requested by the defendant, which is as follows:

"You are instructed that, under the evidence in this case, the law presumes that the dangers and risks incident to the operation of Extra 504 East and Extra 501 East were as open, apparent and obvious to the said Charles M. Cradit as they were to the defendant in this case, and you are further instructed that, when the said Charles M. Cradit continued in the employment of this defendant with that knowledge, he assumed all of the risks and dangers incident to the operation of said trains at the time of the wreck."

479 32. The court erred in entering any judgment herein after the said court had found that the verdict was excessive to the extent of \$10,000.00 and thereby denied to defendant a right, privilege and immunity granted to this defendant by the Federal Employers' Liability Act of April 22, 1908, 35 Stat. at Large, 65, c. 149.

33. That the said court erred in permitting U. A. Buckingham, a witness for the plaintiff, to testify over the objection and exception of the defendant, why he, as conductor of extra 501 east, did not proceed with his train when it left Potter, Nebraska.

34. That the said court erred in permitting U. A. Buckingham, one of the witnesses for the plaintiff, to testify over the objection and exception of the defendant, that he had given no orders to his train to proceed at Potter.

35. That the said court erred in permitting Swan Dedrick, a witness on behalf of the plaintiff, to testify over the objection and exception of the defendant, that the storm prevailing on the night of the wreck, from his observation at Sidney, was as bad as he had observed in Cheyenne County during the thirty years he had resided there.

36. That the said court erred in overruling the following motion made by the defendant during the course of the examination of J. J. McConaughy, a witness for the plaintiff:

"The defendant now moves the court to strike out of the testimony of this witness all of his evidence with reference to an alleged conversation between him and the operator at Mile Post 426 concerning the condition of the weather, for the reason that the same is incompetent, irrelevant, and immaterial, and does not tend to prove any of the issues in this case or any of the acts of negligence charged in this case, and for the further reason that the evidence of this witness shows that if that conversation was had with the operator it

480 was had at a time when it was too late for the defendant company to have stopped train 501 at Potter, Nebraska, or to have prevented the wreck." (B. of Ex. pp. 360-307.)

37. That the said court erred in overruling the following motion

made by the defendant during the course of the examination of J. J. McConaughy, a witness for the plaintiff:

"The defendant moves the court to strike out of the testimony of this witness all of his testimony with reference to the conversation had between the operator at Mile Post 426 and the dispatcher at Sidney, Nebraska, for the reason that it is incompetent, irrelevant, and immaterial, and does not tend to prove any of the issues, in this case or any of the acts of negligence charged in this case, and for the further reason that the evidence of this witness shows that if that conversation was had it was had at a time when it was too late for defendant company to have stopped train 501 at Potter, Nebraska, or to have prevented the wreck." (B. of Ex. p. 307.)

38. That the said court erred in overruling the following motion made by the defendant during the course of the examination of J. J. McConaughy, a witness of the plaintiff:

"The defendant at this time moves the court to strike from the evidence of this witness all of his testimony with reference to an alleged conversation which the witness claims to have had with the dispatcher of defendant company at Mile Post 426, immediately before the wreck, concerning the condition of the weather, for the reason that it is incompetent, irrelevant, and immaterial, and does not tend to prove any of the issues in this case or any of the acts of negligence charged in this case, and for the further reason that the evidence of this witness shows that if that conversation was had it was had at a time when it was too late for the defendant company to have stopped train 501 at Potter, Nebraska, or to have prevented the wreck." (B. of Ex. pp. 307, 308.)

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I.

Errors 1, 2, 3, 20, 30 and 31. These assignments all raise the question of the sufficiency of the evidence to sustain a judgment against the defendant under the Federal Employers' Liability Act, 35 Stat. at Large, 65, c. 149, and therefore will be discussed together.

The petition charges six separate acts of negligence which will be separately discussed and may be briefly stated as follows:

1. That dispatcher Borton, knowing that the weather conditions made it unsafe to operate trains closer together than the distance of one telegraph station to another, negligently ordered Cradit's train to proceed east from Dix to Sidney and extra 501 east to follow Cradit's train in close proximity thereto.

If the defendant had promulgated and was enforcing rules at that time which, when observed by trainmen, provided for the safe operation of trains in any kind of weather, Borton could not have known that the weather conditions made it unsafe to operate trains in the manner charged above, unless he had actual or constructive notice that the trainmen were not observing these rules.

To prove this act of negligence plaintiff simply offered evidence tending to show that the storm was of such severity on the night of the wreck that it was difficult to see the ordinary block signals along

the route the said trains were required to travel, or a red lantern or burning fusee at any considerable distance along said route.

The uncontradicted evidence showed that there was installed and perfectly operating on the night of the wreck a block signal system which, in connection with the rules applicable thereto, was sufficient in and of itself to effect the safe operation of trains in any kind of weather. The uncontradicted evidence further showed that at said time there was in force and effect certain rules governing the operation and protection of trains, which, if observed, were sufficient in and of themselves to effect the safe operation of trains in any kind of weather without the aid of the block signal system.

These latter rules particularly dealt with the duties of flagmen when their train was stopped or delayed while enroute, requiring the use of torpedoes, fusees and lanterns to advise a train of its proximity to another train. Borton, the dispatcher, as said by the trial court in instruction number 16, had a right to assume that the trainmen operating the trains in question would observe the rules promulgated by the company, and the company having promulgated rules which were sufficient to protect the operation of trains under any and all circumstances and in any kind of weather, Borton's act in ordering the two trains to proceed on to Sidney could not under any circumstances constitute negligence in the absence of evidence that he was aware of the fact that the crews in question were violating these rules. There was no evidence in the record which in any way tended to prove that fact nor that Borton had, either actual or constructive knowledge, that the storm was interfering with the observance of block or other signals to the extent that it was impairing the safe operation of trains. The evidence of the plaintiff, therefore, was insufficient to prove this act of Borton to be negligent.

Assuming, however, for the sake of argument that Borton was negligent in ordering the trains in question to proceed eastward from Dix, the plaintiff could not predicate a cause of action upon that act of negligence, because the danger of operating said trains in the vicinity in which they were at the time the orders were issued was better known to Cradit, because of his presence at that particular point, than to Borton, who was located at Sidney. The evidence shows that Cradit was aware at Dix, if not sooner, of the fact that extra 501 east was following his train over the district between Cheyenne and Sidney. If there was any danger of operating these trains that night it was at least as apparent and obvious to Cradit, the experienced brakeman, as it was to the dispatcher. He made

no protest or complaint against proceeding onward with his own train from Dix, nor against extra 501 following his train. He, therefore, must be held to have assumed the risk of the dangers arising from this alleged negligent act of Borton and the Federal Employers' Liability Act, under the circumstances, does not permit him to recover upon this act of negligence. The question of assumption of risk will be more fully discussed under another assignment of error.

2. That G. D. Sage, Assistant Superintendent at Sidney, known—495

ing that the weather conditions then existing made it unsafe to operate trains between Sidney and Cheyenne, negligently ordered a freight train known as extra 510 west to proceed westward from Sidney to Cheyenne at 1:10 A. M.

The evidence showed a severe snow storm prevailing at Sidney at the time this train was ordered west but there is no evidence in the record to show that Sage had either actual or constructive knowledge that the signals necessary to be observed for the safe operation of trains could not be seen on the night in question, and if such signals could not be seen, that the trainmen would disregard the rules of the company and continue to operate their trains notwithstanding their inability to observe the signals controlling the movement of their trains. Consequently this act cannot be held to be negligent.

But this act of Mr. Sage could not sustain a verdict in this case for another reason, i. e., under no circumstances can it be claimed that the ordering of extra 510 west to proceed westward on the night in question was the proximate cause of Cradit's death. The act complained of must not only constitute negligence, but such negligence must be the proximate cause of his death in order to permit recovery under the federal act.

Roberts Injuries to Interstate Employes, Sec. 13.

St. L., I. M. & S. Ry. Co. vs. McWhirter, 229 U. S. 265, 57 L. Ed. 1179.

Seaboard A. L. Ry. Co. vs. Moore, 228 U. S. 433, 57 L. Ed. 907.

484 If the wreck in question could not have been foreseen or reasonably anticipated as the natural and *probably* consequence of the act of Sage in ordering 510 west to proceed westward, then no action can be maintained under the federal act for the injuries resulting therefrom.

Gt. No. Ry. Co. vs. Johnson, 207 Fed. 521 (8th C. C. A.)

Armour vs. Harecrow, 217 Fed. 224 (8th C. C. A.)

It is true that if 510 west had not been ordered westward on the night in question, its engine would not have run out of water at Mile Post 426, and if its engine had not run out of water at Mile Post 426, Cradit's train would not have been stopped at Mile Post 426 for the purpose of picking up engine 510, and if Cradit's train had not been stopped at Mile Post 426 for that purpose, extra 501 east would not have run into Cradit's train. But such deductions do not make the act the proximate cause. To constitute the collision the natural consequence of Sage's act, it must be the consequence which would have ordinarily followed it—the result which might reasonably have been anticipated from it; and in order to make the wreck the probable consequence of Sage's act it must be the consequence that was more likely to follow from his act than not to follow from it.

Armour vs. Harecrow, 217 Fed. 224 (8th C. C. A.)

The direct and immediate cause of the wreck was the failure of

Credit to protect his train as required by rule 99, and of Cameron to govern the operation of his train by the block signals, as was also required by the rules. These derelictions were not more likely to follow Sage's act than not, neither were they within the realm of reasonable anticipation.

Plaintiff, therefore, having failed to show by a preponderance of the evidence that Sage's act was the proximate cause of Credit's death, no recovery can be based thereon.

Rhine vs. Schall, 96 Nebr. 355, 148 N. W. 90.

Zancanella vs. O. & C. B. St. Ry., 93 Nebr. 774, 148 N. W. 158.

485 3. That dispatcher Borton, with knowledge of the weather conditions described above and of the inability of the trainmen to see signals, negligently ordered Credit's train to stop at Mile Post 426 and pick up engine 510 for the purpose of taking it to Sidney.

This act of negligence is subject to the same exceptions noted under the first and second acts of negligence. The company having promulgated rules which were sufficient to protect the trains in question in any kind of weather, and having a right to presume that such rules would be obeyed, its action, through its dispatcher at Sidney, in ordering Credit's train to pick up engine 510 could not be held to be negligent, neither can it be said to have been the proximate cause of the collision. Furthermore, if it could be said that the dispatcher was negligent in ordering trains to operate at all on the night in question because of the severity of the storm, Credit in continuing to carry out such orders with the same, if not better, knowledge of the weather conditions than was possessed by the dispatcher, must be held to have assumed the risk incident to such operation.

4. That at the time of said wreck Credit's train and extra 501 east and extra 510 west were running without headlights.

There was no evidence that this fact in any way contributed to the cause of the wreck, and this allegation as a charge of negligence was withdrawn from consideration of the jury by the trial court in instruction number fourteen.

5. That extra 501 east negligently left Potter, Neb., a station between Dix and Mile Post 426, without its conductor, whose duty it was to observe the block signals, thereby depriving said train of the care and management of its conductor.

The evidence showed that the conductor's position upon the train was in the caboose; that the block signals indicated danger immediately upon being passed by the engine—consequently, these signals would always be at danger when passed by the conductor, and that the operation of the train, so far as the block signals were concerned, did not depend upon his observance of them. (279) This being true, the presence or absence of the conductor from the train had nothing to do with the wreck.

486 6. That while extra 501 east was proceeding eastward without a conductor and without a headlight, it negligently failed to observe

the signals immediately to the rear of Cradit's train and ran into and demolished the caboose of said train.

As before stated, the absence of the conductor from extra 501 and the failure of a headlight in the engine did not constitute actionable negligence for the benefit of the plaintiff. The evidence was uncontradicted that the only signals to the rear of Cradit's train, which might have prevented the wreck, were the automatic block signals, because the evidence was clear that Cradit failed to comply with Rule 99 which required him to signal the following train by torpedoes, fusees or a red lantern. The evidence showed that engineer Cameron of extra 501 east ran by the block signals on the night in question. This act of Cameron would constitute actionable negligence, unless Cradit by his conduct had waived his right to predicate a cause of action thereon or was aware of the fact that Cameron was not depending upon the block signals for the safe operation of his train and was willing to proceed in the face of that danger, thereby assuming the risk. We contend, under the circumstances, that this conduct on the part of Cameron did not constitute actionable negligence for both of the reasons set forth above. Both Cameron and Long, the engineer and fireman, respectively, upon extra 501 east, testified that while their train and Cradit's train were at Dix, Cradit and Phillips came into the caboose of their engine and that Cameron discussed with Phillips, in the presence of Cradit, the difficulty he was having in observing the block signals on account of the storm, and have them to understand that he would have to depend upon them doing "a good job of flagging,"

to use his language, in the event their train should be
487 stopped or delayed for any reason between Dix and Sidney.

Phillips in the presence of Cradit promised Cameron that they would, and Cameron testified that he relied upon that promise, and in proceeding eastward from Dix was depending for the security of his train upon the flagging that Phillips and Cradit had promised to do, rather than upon the block signals. Cradit knew as a result of that conversation that Cameron in following his train did not intend to depend upon the block signals for the safe operation of his train, but would depend upon the protection which Cradit and Phillips promised to give.

In view of this arrangement between Cameron, Phillips and Cradit, Cameron no longer owed to Cradit the duty to operate his train by the block signal system, as Cradit by his conduct and this agreement had waived the necessity of the performance of that duty. Cameron therefore could only be negligent toward Cradit in the event that he should violate the agreement or arrangement made, by running past fusees, torpedoes, or a red lantern, used by Cradit or Phillips for the protection of their train. No torpedoes, fusees, or red lanterns having been placed, or attempted to be placed, on the track in the rear of Cradit's train when it stopped at Mile Post 426, the injury to Cradit, therefore, was due solely and exclusively to his own misconduct in failing to carry out the obligation imposed upon him by the arrangement between himself, Phillips and Cameron. These parties had seen fit to substitute this method of

operating their trains for the safer method which had been adopted and promulgated by the defendant. Cradit had agreed to or acquiesced in the substitution of an unsafe way of performing his work for the safe way provided by his employer and must be held to have assumed the risks, dangers and hazards incident to this new method. The wreck having occurred by reason of his failure to carry out his part of the new method, it must be held that his act was the sole cause of his injury and as a consequence there can be no recovery under the federal act.

- 488 Grand T. W. Ry. Co. vs. Lindsay, 233 U. S. 42, 58 L. Ed. 838.
Ellis vs. L. H. & St. L. R. Co., 155 Ky. 745.
Pankey vs. A. T. & S. F. Ry. Co., 180 Mo. App. 185.

It is true that the jury, in its anxiety to return a verdict in favor of the plaintiff and against the defendant, regardless of the evidence, found in its third special finding that the conversation referred to above between Cameron, Phillips and Cradit did not take place. This conversation was testified to by competent, uncontradicted and unimpeached witnesses, and this court has said that a contrary finding under such circumstances will not be permitted to stand.

White vs. C. B. & Q. R. Co., 93 Nebr. 736, 141 N. W. 1038.

VI.

Error 13. This error challenges instruction number five hereinbefore set forth under the 13th assignment of error.

The evil of this instruction is that the court thereby submitted to the jury the inquiries of fact set forth in instruction number one concerning many of which there was no evidence. This court has repeatedly held such an instruction to be reversible error. In the case of McCormick E. M. Co. vs. Willan, 63 Nebr. 391, 88 N. W. 497, the court said:

"An instruction which submits to the jury an inquiry of fact concerning which there is no evidence, is reversible error."

See also,

Thom vs. County of Dodge, 64 Nebr. 845, 90 N. W. 763.
Eisenstrant vs. Madden, 97 Nebr. 466, 150 N. W. 627.

This instruction was also erroneous because it eliminated from consideration of the jury the defense of assumption of risk which was available to the defendant under the Federal Employers's Liability Act and was involved in the issues and facts of this case as will appear in the discussion of that question under a subsequent assignment of error.

VII.

Error 14. Under this assignment of error we challenge instruction number six given by the court to the jury on its own motion. In this instruction the court attempted to set forth the whole law of the case

as fixed by the Federal Employers' Liability Act, but neglected to advise the jury that the defense of assumption of risk was available to this defendant under the facts as established by the evidence. That the Federal Employers' Liability Act did not preclude the defense of assumption of risk in a proper case, see the authorities cited under paragraph XIII of the Propositions of Law set forth in this brief. The giving of this instruction was reversible error, as is evidenced in the following authority:

"Where an instruction assumes to define the whole law of the case and omits a material element, it is reversible error which may be relied upon although no proper instruction has been requested by the party seeking to take advantage of the defect."

City of South Omaha vs. Hager, 66 Nebr. 803, 92 N. W. 1017.

VIII.

Error 15. Under this assignment of error we challenge instruction number ten, which is set forth in full under the above assignment, and which denied the defendant a right and immunity granted defendant in the Federal Employers' Liability Act, *supra*.

In this instruction the court told the jury that the plaintiff was entitled to recover "such sum as will compensate the widow and minor children of the deceased, Charles M. Cradit, in whose behalf the plaintiff sues, for the pecuniary loss, if any, that they may have suffered by reason of the death of the said Charles M. Cradit." The rule of damages announced by the Supreme Court of the United States as applicable to actions prosecuted under the Federal Employers' Liability Act is set forth in the case of *American R. R. vs.*

Didricksen 227 U. S. 145, as follows:

490 "The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe."

See also,

G. C. & S. F. Ry. Co. vs. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426.

N. C. R. Co. vs. Zachary, 232 U. S. 248, 34 Sup. Ct. 305.

By this instruction the court permitted the jury to award the plaintiff damages for such pecuniary loss as the beneficiaries "may" suffer in the future. This instruction violated the rule that future damages are governed by the rule of "reasonable certainty" and this court has held that an instruction to a jury to award what plaintiff "may" suffer in the future opens the door for unrestrained speculation and is erroneous and prejudicial error.

Nixon vs. O. C. B. St. Ry. Co., 79 Nebr. 550, 113 N. W. 117.

C. R. I. & P. vs. McDowell, 66 Nebr. 170, 92 N. W. 121.

Bower vs. C. & N. W. Ry. Co., 96 Nebr. 419, 148 N. W. 145.

See also,

C. M. & St. P. R. Co. vs. Lindeman, 143 Fed. 946 (8th C. C. A.)

XI.

Error 18. This error challenges instruction number sixteen, the first paragraph of which is as follows:

"As one of its defenses the defendant pleads what is known and called assumption of risk. You are instructed as a matter of law that a servant or employe assumes the ordinary risks and dangers incident and peculiar to the employment upon which he enters, but he does not assume any risk or dangers due to the master's or employer's negligence, nor does he assume risks or dangers arising from sudden, unforeseen circumstances, not ordinarily incident to his employment."

At the time this case was tried the Supreme Court of the United States had not passed upon the question as to whether or not the rule of assumption of risk as then in force and applied by the Federal Courts was still available as a defense in actions under the Federal Employers' Liability Act. There was at that time some state authorities holding that the rule did apply, but a federal district court holding that the rule did not apply. Since the trial of the above case, however, the Supreme Court of the United States has passed upon this question a number of times, holding that except as to violations of federal statutes enacted for the safety of employes, the defense of assumption of risk is a complete bar to an action under the federal act. The principal cases so holding are:

Seaboard A. L. Ry. Co. vs. Horton, 233 U. S. 492, 58 L. Ed. 1062.

So. R. Co. vs. Crockett, 234 U. S. 725, 34 Sup. Ct. 897.

Other cases announcing the same rule are cited under the 13th proposition of law heretofore cited in this brief under the heading of "Propositions of Law Involved in the Case relied upon by the Appellant."

That court has also held that in cases arising under the federal act, the defense of assumption of risk is to be applied as construed and defined by the decisions of the national courts.

Seaboard A. L. Ry. Co. vs. Horton, 233 U. S. 492, 58 L. Ed. 1062.

Seaboard A. L. Ry. Co. vs. Moore, 228 U. S. 433, 57 L. Ed. 907.

In the instructions challenged herein the court told the jury that Cradit did not assume risks or dangers arising as a result of the master's negligence. This is contrary to the rule of assumption of risk as defined by the decisions of the national courts. In Roberts' Injuries to Interstate Employes, Section 98, the rule is announced as follows:

"Under the ruling of the United States Supreme Court, an employe of a railroad engaged in interstate commerce, whether he is actually aware of them or not, assumes such dangers and risks as are ordinarily incident to his employment, and he also assumes the risks due to the negligence of his employer when he

becomes aware of the defect and of the risk arising from it, or when such defects and risks are so open and obvious that an ordinarily prudent person would have observed and appreciated them, and then continues in the service without complaint."

See also,

Gila B. G. & N. R. Co. vs. Hall, 232 U. S. 94, 58 L. Ed. 521.

Texas P. R. Co. vs. Harvey, 228 U. S. 319, 57 L. Ed. 852.

Choctaw O. & G. R. Co. vs. McDade, 191 U. S. 64, 48 L. Ed. 96.

Schlemmer vs. Buffalo R. & P. R. Co., 220 U. S. 590, 55 L. Ed. 596.

That this rule is available to the defendant in this case is evident from the fact that plaintiff's main basis for recovery was that defendant was negligent in continuing to operate its trains during the storm prevailing at the time of the wreck. Cradit, being one of the trainmen engaged in operating a train that night, was certainly aware of the dangers incident to, or likely arising as a result of such alleged negligent act. He knew the weather conditions out along the line better than the dispatcher at Sidney, upon whose negligence plaintiff relies for recovery. His train was at Dix for more than an hour when the storm was at its height and as bad as it was at the time of the wreck. His train also stopped at Potter, but he made no complaint at either place about continuing to assist in the operation of his train into Sidney. By continuing in his work in the face of this known danger, whether same arose from the negligence of the defendant or not, he assumed the risks thereof. It was a plain error for the court to tell the jury that Cradit did not assume any dangers or risks arising as a result of the negligence of the defendant and denied to
493 the defendant a defense to which it was entitled in actions based upon the Federal Employers' Liability Act.

494 And afterwards, to-wit, on the 2nd day of October, 1915, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1915, Oct. 2.

No. 18439.

CHARLES M. HADLEY, Admr., Appellee,

v.

UNION PACIFIC R. Co., Appellant.

Appeal from the District Court of Cheyenne County.

This cause coming on to be heard upon stipulation of parties for an extension of time within which to serve and file briefs herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that said stipulation be, and the same hereby is,

allowed and appellant given until October 1, 1915, to serve and file briefs herein.

A. M. MORRISSEY,
Chief Justice.

And afterwards, to-wit, on the 4th day of November, 1915, the following among other proceedings were had and done in said supreme court, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1915, Nov. 4.

The following causes were argued by counsel and submitted to the court:

* * * * *

No. 18439.

HADLEY, Admr.,

v.

UNION PACIFIC R. Co.

Appeal from Cheyenne County.

495 And afterwards, to-wit, on the 19th day of February, 1916, there was rendered by said court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1916, Feb. 19.

No. 18439.

CHARLES M. HADLEY, Admr., Appellee,

v.

UNION PACIFIC R. Co., Appellant.

Appeal from the District Court of Cheyenne County.

This cause coming on to be heard upon appeal from the district court of Cheyenne county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and same hereby is, reversed and cause remanded unless appellee files a remittitur in the sum of fifteen hundred dollars in this court within twenty days. If such remittitur is so filed the judgment of the district court for thirteen thousand five hundred dollars will be affirmed. That appellant pay all costs incurred herein, taxed at \$—, and have and recover of and from ap-

pellee its costs so expended. For all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Morrissey, C. J.

Fawcett and Hamer, JJ. not sitting.

A. M. MORRISSEY,

Chief Justice.

496 And on the same day there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the word- and figures following, to-wit:

497

No. 18439.

HADLEY

v.

UNION PACIFIC RAILROAD CO.

Opinion. Filed February 19, 1916.

1. A verdict for plaintiff assessing the total damages at \$25,000, under the evidence set out in the opinion, held to be excessive.
2. In construing a federal statute this court will follow the construction placed upon it by the federal courts.
3. In an action under the federal employers' liability act (35 U. S. St. at Large, ch. 149, p. 65), where the court has instructed the jury that the contributory negligence of deceased has been shown, but the jury makes no deduction in the amount of the verdict because of such negligence, the court may order such remittitur as seems proper under the evidence.
4. A general verdict for the plaintiff may be returned by the jury in an action brought by the administrator under the federal employers' liability act for the benefit of the widow and minor children of the deceased employee without apportioning the damages among the beneficiaries.

498 MORRISSEY, C. J.:

This is an appeal from a judgment recovered against defendant in an action brought under the federal employers' liability act, ch. 149, p. 65, 35 U. S. Stat. at Large. Plaintiff is administrator of the estate of Charles M. Cradit, who died March 14, 1913, from injuries received while in the employ of defendant, as a railroad brakeman, on one of its interstate freight trains. The suit was for the benefit of the widow and two surviving children. Deceased received his injuries while in the caboose of his train, when it was run into and wrecked by the engine of another of defendant's trains.

This accident occurred at a station known as Mile Post 426, located between Sidney, Nebraska, and Cheyenne, Wyoming. The evening before, Cradit left Cheyenne with his train, designated as extra 504 east, for Sidney, Nebraska, which is 102 miles distant from Cheyenne,

and this section of the road, constituting a freight division, is known as the fourth district of the Nebraska division. An extra freight train is designated by the number of its engine, and the direction in which it is going. When Cradit's train left Cheyenne, the weather conditions were unsettled on that division; they continued to grow worse during the night, and, at the time of the accident, a severe storm, or blizzard, was raging. Closely following extra 504 east, was another freight train, designated extra 501 east.

Defendant's line was double tracked west to Mile Post 426, and from that point west to Dix its line was single tracked, where it again diverges into a double track. At all points on its system, it is

equipped with an automatic block signal system by which
499 the track is divided into blocks, and by which a red light is displayed one block in the rear of every train, and this light remains red until the train has passed out of that block and into another, when the light turns to green. Red lights signify danger, and green lights, signify that the track is clear.

These two trains appear to have been run in the usual way, extra 501 east being a block behind extra 504 east until they reached Dix. Here extra 504 east pulled in on a passing track. And soon thereafter extra 501 east arrived and the two trains stood for some time on the tracks at Dix. The storm had become so severe that the acetylene headlights were extinguished, and common white lanterns were substituted therefor.

It is claimed that while these trains were waiting at Dix for passenger trains to go through, the deceased and his conductor went to the cab of engine 501 and visited with the crew of that engine; that conductor Phillips of extra 504 east had a conversation with engineer Cameron and fireman Long of extra 501 east, in the presence of Cradit, in which the engineer said that it was hard to see the block signals and asked conductor Phillips to do a good job of flagging, and "use lots of fusees all the way down," and also asked that if stops were made that fusees be thrown out and a torpedo put down.

Cradit's train left Dix at 2:35 A. M. and arrived at Potter, the next station east, at 3:05 A. M., thus clearing the block for extra 501 east, which thereupon left Dix and arrived at Potter at 3:35 A. M., where it took water and departed at 3:45 A. M. The engineer
500 pulled out of Potter without orders from the conductor, and the conductor was left at that station while his train proceeded.

While these trains had been proceeding eastward, extra freight 510 west had been made up at Sidney, and started for Cheyenne at 1:10 A. M.; but the storm was so violent that it required one hour and fifty-five minutes to reach Mile Post 426, 11 or 12 miles west of Sidney, arriving there at 3:05 A. M. The engine's supply of water had been exhausted, and this condition was reported to the train dispatcher at Sidney. The dispatcher thereupon ordered extra 504 east to pick up engine 510 west and take it to Sidney. The severity of the storm was such that lanterns could be seen but a few feet. The switch had been left partly open and blocked by snow, and the conductor of the west bound train testified, that in making his way

from the caboose to the station he could not face the storm, but was compelled to walk backward, and that it took him thirty-five minutes to travel the length of his train. Communication with the train dispatcher was had over the telephone and the conductor testified that the dispatcher was notified that the storm was so severe that the trainmen could not see, and was advised to let extra 504 east proceed and have extra 501 east pick up the engine of the west-bound train. This the dispatcher refused to do, and the engine crews began the work of clearing the switch to make the necessary couplings to pick up the stalled engine.

Cradit's train had reached Mile Post 426 about 3:35 and the engineer "whistled out a flag." While the engine crews of 501 extra 504 east and 510 west with their head brakemen were endeavoring to clear the switch and couple the stalled engine into the train of extra 504 east, extra 501 east, which left Potter without its conductor, ran past the block signals, and collided with the caboose of extra 504 east, killing Cradit, conductor Phillips, three stockmen, injuring two others and setting fire to the caboose. This collision occurred thirty or forty minutes after the arrival of Cradit's train at Mile Post 426.

Under defendant's rules, it was Cradit's duty, when his train stopped and the engineer "whistled out a flag," to go out and put down torpedoes, throw out fuses and protect his train from a rear-end collision. This he did not do.

There was a verdict for plaintiff in the sum of \$25,000, which the trial court reduced to \$15,000, and defendant has appealed, urging 38 separate assignments of error.

Plaintiff charges defendant with negligence in operating the three freight trains, heretofore mentioned, while this violent storm was raging; and in permitting extra 501 east to run in such close proximity to extra 504 east. It is claimed that it was negligence on the part of the assistant superintendent at Sidney to send out the west-bound train under the circumstances, and with knowledge of the storm; and that it was negligence on the part of the train dispatcher in directing extra 504 east to pick up the stalled engine when that train ought to have been permitted to continue into Sidney and let the train which he knew was following in close proximity, and 502 which finally caused the accident, pick up the engine; that it was negligence for extra 501 east to be operated without its conductor, and for its engineer to run past the block signals.

The wind was blowing at the rate of 30 miles an hour or more; snow was falling, or blowing; there was difficulty in observing the block signals, if, in fact, they could be observed at all, and the dispatcher and assistant superintendent knew that it was an unusual storm. But the passenger and mail trains went over the line during the night; none of the trainmen had reported that it was impossible to see the block signals, or that the headlights were not burning. It cannot be said that defendant was guilty of actionable negligence for a mere failure to tie up its trains. On the other hand it is clear that there was negligence on the part of the engineer of extra 501 east in leaving the station at Potter, without his conductor, and pro-

ceeding through this storm without observing the block signals, set at danger, in the rear of extra 504 east. These block signals are admitted to have been working, but the members of the engine crew claim they were unable to see them because of the severity of the storm. However, they knew the distance from Potter to Mile Post 426, and the location of these block signals, and also knew that they were following closely behind another train, and that with the weather conditions prevailing that train was likely to be stalled, and they had been warned by the dispatcher that extra 504 east was at Mile Post 426 "and might not be out before they got there and to look out for her." The dispatcher knew that it required 1 hour

503 and 55 minutes for the west-bound train to make the run of

11 or 12 miles to Mile Post 426, and that in doing so the engine exhausted its supply of water. He knew that east-bound extra 504 had left Potter only 36 minutes ahead of extra 501 east. When he ordered extra 504 east to stop at Mile Post 426 and do work which would require some time under the existing conditions, he was requested by the conductor of the west-bound train and the engineer of extra 504 east to let the first train proceed and leave the second train to do the switching and pick up the stalled engine. The conductor of the west-bound train testified that, through the operator, he had a conversation over the telephone, with the dispatcher, and "told him we could not see, the storm was so severe and to let extra 504 go." The conductor asked to have the first east-bound train proceed and leave the second east-bound train to pick up the engine of his train. It would seem that due regard for the safety of the employees would have impelled him to grant this request. Had it been granted, in all probability, the accident would have been avoided. "Furthermore, the negligence of the train dispatcher need not have been the sole and only cause of the accident to charge the defendant with negligence. If his negligence contributed to the accident—that is to say, if his action had a share in bringing the disaster—the defendant will be liable." *Sandridge v. Atchison, T. & S. F. R. Co.*, 193 Fed. 869, 875.

Appellant justified the action of the dispatcher in this regard by saying that had he granted this request, it would have de-
504 layed the removal of the west-bound freight train an hour or two, and that by that time the snow would have accumulated around this train in such quantities as to block traffic on its lines. If the dispatcher realized that the storm was of such severity as this, he ought to have known there was grave danger of train crews being unable to see the block signals, and as he was running the trains in close proximity, prudence would have dictated that he grant the request of the trainmen, which in itself was warning of danger, and permit the first train to proceed.

Appellant denies that any negligence on the part of the assistant superintendent was shown, or that the acts charged constitute actionable negligence, and that the court erred in refusing its requested instructions withdrawing from the jury consideration of the acts of negligence charged against him. The conductor of the west-bound train testified that he and the assistant superintendent had

different conversations before he took out the train. The conductor advised that the train be split in two because, owing to the severity of the storm, the engine could not pull the train through to Potter, the next watering station. The assistant superintendent assisted in cleaning out the turn-table that night, and at the second conversation they had, the assistant superintendent stated in the most positive language that there was "no use of running the train." It appears that he knew the weather conditions; that the conductor, who was an experienced railroad man, called his attention to the impracticability of sending out the train; that he admitted the lack
505 of necessity for doing so, and yet, in the face of this, he sent it out. Of course, this act alone did not cause the accident but it formed one link in a chain of incidents culminating in the wreck.

The negligence of the engineer of extra 501 east and of conductor Phillips of extra 504 east, and the contributory negligence of the deceased is conclusively shown. It follows that there was no error in submitting these issues to the jury.

It is urged by appellant that there can be no recovery because Cradit assumed the risk incident to his employment and to the peculiar circumstances under which the trains were operated that night. It is said in the brief that the action of Cameron in running his train past the block signals would constitute actionable negligence, "unless Cradit, by his conduct, had waived his right to predicate a cause of action thereon, or was aware of the fact that Cameron was not depending upon the block signals for the safe operation of his train and was willing to proceed in the face of that danger, thereby assuming the risk." Engineer Cameron testified that he told conductor Phillips, in the presence of Cradit, to do a good job of "flagging," and appellant seriously contends that Cradit knew that the engineer, in proceeding east from Dix, would not depend upon the block signals, but upon the "flagging" to be done by Cradit. That because of this alleged conversation and understanding Cameron no longer owed Cradit the duty to operate his train under the block
506 signal system. There was a conflict in the testimony as to this alleged conversation and agreement. The jury made a special finding that the conversation was not had. In *Grand Trunk W. R. Co. v. Lindsay*, 201 Fed. 836, plaintiff was a switchman on defendant's railroad, and in making couplings was obliged to go between the cars. There was conflicting evidence respecting the giving of a signal to the engineer. As in this case, the jury found for the plaintiff. In the concluding paragraph of the opinion, on rehearing, the court said: "Under the employers' liability act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when

plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act." In *Wright v. Yazoo & M. V. R. Co.*, 197 Fed. 94, the court said: "While the doctrine of assumption of risk sometimes shades into that of contributory negligence, there is a clear distinction between the doctrines, an employee being held to assume the risk of ordinary dangers of his occupation, and also those risks which are known to him or are so clearly observable that he may be presumed to know of them, while contributory negligence constitutes omission
507 of an employee to use those precautions for his own safety which ordinary prudence requires." The finding of the jury on this question is conclusive of the question.

It is urged that the verdict is so excessive as to indicate passion or prejudice on the part of the jury. Deceased was 31 years of age, with a life expectancy of approximately 34 years. He was earning from \$85 to \$100 per month, but used from \$15 to \$18 per month for his personal expenses while out on his work. The balance was contributed to the support of his family.

No proof was offered to show that deceased's earning capacity would increase with the years. "It ought to be assumed that plaintiff proved his earnings at their best." *Hoffman v. Chicago & N. W. R. Co.*, 91 Neb. 783.

Tables of expectancy and the present worth of judgments are always more or less unsatisfactory. It is never possible to ascertain with mathematical accuracy the pecuniary loss which a family will suffer from the death of the breadwinner, but taking his wages at \$100 per month, the maximum, and deducting therefrom the amount which he spent for his personal expenses, and calculating the present value at the date of the verdict, the evidence will not sustain a verdict in excess of \$18,000, but the verdict as returned is not so excessive as to warrant the court in setting it aside.

We think \$18,000 may reasonably be taken as the gross amount of damages. The court properly directed the jury that deceased was guilty of contributory negligence, and that the dam-
508 ages should be diminished in proportion to the amount of negligence attributable to him. By special finding the jury found that nothing should be deducted, and no deduction was made by the jury. By direction of the trial court a remittitur of \$10,000 was entered, and the verdict permitted to stand at \$15,000. The record does not disclose the court's reasons for making the remittitur; whether it was because he regarded the original verdict as \$10,000 too high; whether he made the deduction ordered because of the contributory negligence of deceased, or whether he thought it ought to be deducted for both reasons. In any event, it is not material to a disposition of the case here.

Having reached the conclusion that without making any deduction because of the contributory negligence the verdict ought to be reduced to \$18,000, we are now required to determine what amount, if any, should be remitted because of deceased's contributory negligence.

Our right to determine this matter is questioned by appellant, and

in place of making the reduction we are asked to reverse the case for a new trial. This being a federal statute, the interpretation placed upon it by the federal courts will be followed. *South Covington & C. Street R. Co. vs. Finan's Admx.*, 153 Ky. 340.

In *Yazoo & M. V. R. Co. v. Wright*, 207 Fed. 281, the refusal of the trial court to instruct that deceased was guilty of contributory negligence was assigned as error, and on the motion for a new trial it was found that he was guilty of contributory negligence. 509 But the court ordered a remittitur, which was accepted, and the court said the railroad company could not complain.

In *Pennsylvania Co. v. Sheeley*, 221 Fed. 901, the court had this very question before it and disposed of it in the following language: "It seems probable that the jury did not make allowance for contributory negligence as the statute requires. There must, therefore, be another trial, unless this error can be cured by a remittitur. In making to plaintiff an offer of conditions upon which part of a judgment may stand, we cannot take the place of the jury. We must only be sure that no substantial injustice comes to the party against whom the judgment is maintained. If the conditions so fixed seem unjust to the plaintiff, he can protect himself by declining to accept the offer. The utmost which defendant in this case can claim is that the jury made no allowance on account of Sheeley's conduct, and so that the \$6,500 represents the total damages. The negligence of the engineer being established according to the theory of the petition, we think there would be no fair room to say that Sheeley's negligence should be considered as more than one-half as much as the engineer's or more than one-third of the whole. It follows that if plaintiff desires to accept a judgment for two-third- of the amount found below, and within 30 days files evidence of that acceptance in accordance with our practice, the judgment will be affirmed; otherwise, it will be reversed and remanded for new trial."

510 In the instant case negligence may be traced to so many different people that it is difficult to determine the proportion that ought to be charged to deceased, but surely it cannot be less than one-fourth of the whole, and this deduction will be made from the \$18,000, which we find to represent the total damages.

The point is made in the brief that there is not sufficient evidence to prove the separate pecuniary loss of each of the parties for whose benefit the action was brought. The jury is not required to apportion the damages among the beneficiaries. A general verdict for the plaintiff may be returned. In a very recent case, the supreme court of the United States passed upon this question and said: "Under Lord Campbell's act (9 & 10 Victoria, ch. 93, sec. 2) and in a few of the American states the jury is required to apportion the damages in this class of cases. But even in those states the distribution is held to be of no concern to the defendant, and the failure to apportion the damages is held not to be reversible error (*Norfolk & W. R. Co. v. Stevens, Admr.*, 97 Va. 631, 46 L. R. A. 367, 34 S. E. 525; *International & G. N. R. Co. v. Lehman*, 30 Tex. Civ. App. 3, 72 S. W. 619), certainly not unless the defendant can show that it has been injured by such failure. The employers' liability act is substantially

like Lord Campbell's act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of congress to change what was the

English practice so as to make the federal statute conform to
 511 what was the rule in most of the states in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for, in connection with the determination of negligence and damage, it would be necessary also to enter upon an investigation of the domestic affairs of the deceased—a matter for probate courts and not for jurors. If, as in the McGinnis case, the plaintiff sues for the benefit of one who is not entitled to share in the recovery (Taylor v. Taylor, 232 U. S. 363, 57 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914, C, 159), and if her inclusion in the suit might increase the amount of the recovery, the defendant may raise the question, in such mode as may be appropriate under the practice of the court in which the trial is had, so as to secure a ruling which will prevent a recovery for one not entitled to share in the benefits of the federal act. But no such question was or could have been raised in the present case, since, as matter of law, the wife and minor children were all to be treated as entitled to share in the amount recovered for the death of the husband and father." Central V. R. Co. v. White, 238 U. S. 507.

It is not necessary to further extend the discussion of the question pressed upon our consideration. Those not discussed have been fully considered, but are not thought to be controlling.
 512 We are of the opinion that the case was fairly presented to the jury; that no substantial error of law to the prejudice of appellant was committed, and it is, therefore, ordered that if the plaintiff file a remittitur in the sum of \$1,500, leaving the judgment \$13,500, within 20 days, the judgment of the district court, as thus reduced, will be affirmed; otherwise, the judgment will be reversed and the cause remanded for further proceedings.

513 And afterwards, to-wit, on the 2nd day of March, 1916, there was filed in the office of the clerk of said supreme court a certain Remittitur, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

#18439.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY, Appellant.

Remittitur of \$1500.00.

Comes now Charles M. Hadley, administrator of the estate of Charles M. Cradit, deceased and hereby remits from the judgment

rendered in the District Court of Cheyenne County, the sum of \$1500.00, leaving the original judgment \$13,500, as required by the decision of this Honorable Court.

CHARLES M. HADLEY,
Administrator of the Estate of
Charles M. Cradit, Deceased.

Endorsed: 18439. Hadley v. Union Pacific Railroad Co. Remittitur. Supreme Court of Nebraska. Filed Mar. 2, 1916. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 4th day of March, 1916, there was rendered by said court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1916, March 4.

514

No. 18439.

CHARLES M. HADLEY, Admr., Appellee,
 v.
 UNION PACIFIC R. Co., Appellant.

Appeal from the District Court of Cheyenne County.

Remittitur for \$1500, heretofore ordered by this court to be filed, having been filed by appellee herein, it is by the court ordered that the judgment of the district court in the sum of \$13,500, together with interest at the rate of seven per cent per annum from October 8, 1913, be, and the same hereby is, affirmed. That appellant pay all costs incurred herein, taxed at \$—, and have and recover of and from appellee its costs so expended. For all of which execution is hereby awarded, and that a mandate issue accordingly.

A. M. MORRISSEY,
Chief Justice.

515

The following is a true and correct copy of Subdivision "d" of Rule 8 of the supreme court of Nebraska as the same was in force and effect on March 29, 1916, and is a copy of the same as required in the præcipe directed to the clerk of the supreme court, of the appellant in the appeal taken herein to the Supreme Court of the United States.

d. For rehearing.—All motions for rehearing must be printed and may be filed as of course at any time within forty days from the filing of the opinion or rendition of the judgment of the court in the case. Such motion must specify distinctly the grounds upon which it is based and include the brief in support thereof, which shall be prepared as nearly as possible in accordance with Rules 12 and 13. Fifteen copies must be filed with the clerk. In original cases where the error assigned is that the court erred as to the legal

principles involved or in its application of the law to the facts, the foregoing provisions shall apply; but as to all other assignments the motion must be made as provided in section 7884, Revised Statutes, 1913, and may be typewritten.

And afterwards, to-wit, on the 29th day of March, 1916, there was filed in the office of the clerk of said supreme court a certain Motion for Rehearing, in the words and figures following, to-wit:

516 In the Supreme Court of the State of Nebraska.

No. 18439.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M.
Cradit, Deceased, Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY, Appellant.

Motion for Rehearing.

Comes now the Union Pacific Railroad Company, appellant, and moves the court for a rehearing of the above cause for the following reasons:

1. The court failed to pass upon certain legal questions involved in this controversy which are vital thereto.

2. The court failed to pass upon error No. 12, assigned in the original brief of appellant herein, which is a substantial error of law to the prejudice of this appellant.

3. The court failed to pass upon error No. 13, assigned in the original brief of appellant herein, which is a substantial error of law to the prejudice of this appellant.

4. The court failed to pass upon error No. 15, assigned in the original brief of appellant herein, which is a substantial error of law to the prejudice of this appellant.

5. The court failed to pass upon error No. 16, assigned in the original brief of appellant herein, which is a substantial error of law to the prejudice of this appellant.

6. The court failed to pass upon error No. 17, assigned in the original brief of appellant herein, which is a substantial error of law to the prejudice of this appellant.

7. The court failed to pass upon error No. 18, assigned in the original brief of appellant herein, which is a substantial error of law to the prejudice of this appellant.

517 8. The court failed to pass upon error No. 19, assigned in the original brief of appellant herein, which is a substantial error of law to the prejudice of this appellant.

9. The court failed to pass upon errors Nos. 21 and 22, assigned in the original brief of appellant herein, which are substantial errors of law to the prejudice of this appellant.

10. The court failed to pass upon error No. 35, assigned in the

original brief of appellant herein, which is a substantial error of law to the prejudice of this appellant.

11. The court failed to pass upon errors Nos. 36, 37 and 38, assigned in the original brief of appellant herein, which are substantial errors of law to the prejudice of this appellant.

12. Certain of the matters recited in support of the opinions of the court as established facts are not supported by the record.

13. The court erred in its application of the law to the facts as recited in the opinion.

14. The court erred as to some of the legal principles involved.

15. This court erred in fixing the amount that the gross damages suffered by the plaintiff should be diminished on account of the contributory negligence of the deceased, thereby denying to this appellant a right, privilege and immunity granted to it by the Federal Employers' Liability Act of April 22d, 1908, 35 Stat. at Large, 65, Chap. 149, and a right granted to this appellant under the provisions of Art. 1, Sec. 6 of the Constitution of the State of Nebraska, wherein it is provided that the right of trial by jury shall remain inviolate, and of the 7th Amendment to the Constitution of the United States, wherein it is provided that in suits at law where the value in controversy shall exceed \$20.00, the right of trial by jury shall be preserved.

518 16. The gross damages ultimately fixed by the court in its opinion are not sustained by the evidence.

UNION PACIFIC RAILROAD COMPANY,

Appellant,

By EDSON RICH,

A. G. ELLICK,

B. W. SCANDRETT,

Its Attorneys.

Endorsed: No. 18439. In the Supreme Court of the State of Nebraska. Hadley, Admr., vs. Union P. R. Co. Motion for Rehearing. Supreme Court of Nebraska. Filed Mar. 29, 1916. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 29th day of April, 1916, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

519 Supreme Court of Nebraska, January Term, A. D. 1916,
March 4.

No. 18439.

CHARLES M. HADLEY, Admr., Appellee,

v.

UNION PACIFIC R. Co., Appellant.

Appeal from the District Court of Cheyenne County.

This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court; upon due considera-

tion whereof, the court finds no probably error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion of appellant for a rehearing be, and the same hereby is, overruled, and a rehearing herein denied.

A. M. MORRISSEY,
Chief Justice.

520 And afterwards, to-wit, on the 2nd day of May, 1916, there was filed in the office of the clerk of the supreme court of Nebraska by the said Union Pacific Railroad Company a petition for a Writ of Error, which said petition was on said day by Hon. A. M. Morrissey, Chief Justice of said supreme court, duly allowed upon condition that the said Union Pacific Railroad Company execute a bond to Charles M. Hadley as administrator of the estate of Charles M. Cradit, deceased, in the sum of \$20,000.00, which said original petition for Writ of Error with the allowance thereof endorsed thereon is hereto attached.

521 In the Supreme Court of the State of Nebraska.

General No. 18439.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff & Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant & Appellant.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled case, the defendant hereby prays a writ of error, from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

UNION PACIFIC RAILROAD
COMPANY,

By N. H. LOOMIS,
EDSON RICH,
A. G. ELLICK,

Its Attorneys.

STATE OF NEBRASKA,

Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Union Pacific Railroad Company to Charles M. Hadley, as Administrator of the Estate of Charles M. Cradit, Deceased, in the sum of Twenty Thousand Dollars; such bond when approved to act as a supersedeas.

Dated May 2, 1916.

A. M. MORRISSEY,
Chief Justice Supreme Court of Nebraska.

522 [Endorsed:] 18439. In the Supreme Court of the State of Nebraska. Chas. M. Hadley, as Adm'r of the Estate of Charles M. Cradit, Deceased, Plaintiff & Appellee, vs. Union Pacific R. R. Company, Defendant & Appellant. Petition for Writ of Error and Allowance. Supreme Court of Nebraska. Filed May 2, 1916. H. C. Lindsay, Clerk.

523 And on the same day there was filed in the office of the clerk of said supreme court by the said Union Pacific Railroad Company its Assignment of Errors, which said original Assignment of Errors with prayer for reversal is hereto attached.

524 In the Supreme Court of the State of Nebraska.

General No. 18439.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Plaintiff & Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant & Appellant.

Assignment of Errors.

Comes now the Union Pacific Railroad Company, appellant herein, and defendant in the court below, and shows to the court that the above entitled cause is an action brought by Charles M. Hadley, as Administrator of the Estate of Charles M. Cradit, Deceased, against the Union Pacific Railroad Company under an act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," commonly known as the Federal Employers' Liability Act, approved April 22d, 1908, and found in the 35 United States Statutes at Large, page 65, chap. 149, and the amendments thereto; and that in the records, proceedings and final judgment of the Supreme Court of the State of Nebraska in said cause there are the following errors upon which the said Union Pacific Railroad Company will rely in the prosecution of the writ of error herein, the parties hereto being hereinafter designated as plaintiff and defendant, respectively, as in the court below:

1.

The Supreme Court of Nebraska erred in affirming the judgment of the District Court of Cheyenne County, Nebraska, in favor of the plaintiff and against the defendant.

2.

The Supreme Court of Nebraska erred in holding that there was sufficient evidence introduced at the trial of said cause in the District Court of Cheyenne County, Nebraska, to sustain a verdict of

525 the jury in favor of the plaintiff and against the defendant

under the act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," approved April 22d, 1908, commonly known as the Federal Employers' Liability Act, and the amendments thereto.

3.

The Supreme Court of Nebraska erred in fixing and determining the amount that the gross damages suffered by the plaintiff should be diminished on account of the contributory negligence of Charles M. Cradit, Deceased, thereby denying to the Union Pacific Railroad Company, appellant in said court, a right, privilege and immunity granted to it by section 3 of an act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," commonly known as the Federal Employers' Liability Act, approved April 22d, 1908, wherein it is provided as follows:

"In all actions hereafter brought against any such common carrier by railroad, under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employe or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe;"

and a right granted to said Union Pacific Railroad Company under the provisions of the Seventh Amendment to the Constitution of the United States, wherein it is provided that in suits at law where the value in controversy shall exceed \$20.00, the right of trial by jury shall be preserved.

4.

The Supreme Court of Nebraska erred in holding that the trial court did not err in giving to the jury on its own motion instruction No. 5, which reads as follows:

"The gist of plaintiff's action is that the death of Charles M. Cradit was caused by the negligence of the defendant Railroad Company in the operation of its trains on its tracks at or near what was called Mile Post 426 on the night of March 13 and 14, 1913.

Facts which are alleged by one party and admitted by the other in the pleadings do not require any proof; so that the negligence of the defendant, and that such negligence was the cause of the injury to Charles M. Cradit that resulted in his death, and that his death was not the result of his own negligence, are among the decisive questions for you to pass upon in this case.

It rests upon the plaintiff to prove by a preponderance of the evidence the facts necessary for his recovery; that is, that the death of Charles M. Cradit resulted from an injury inflicted upon him by the defendant Railroad Company in the negligent and careless operation of its railroad in running its trains at the time and place set out in the petition.

If the plaintiff establishes this fact by a fair preponderance of the evidence, then the burden will rest upon the defendant to establish by a fair preponderance of the evidence that the negligence and carelessness of the said Charles M. Cradit was the proximate cause of the injury that resulted in his death, or that his negligence contributed to his injury and death."

5.

The Supreme Court of Nebraska erred in holding that the trial court did not err in giving to the jury on its own motion instruction No. 6, which reads as follows:

"This action is brought under what is called the Employers' Liability Act, a law passed by the United States Congress, which law provides that every common carrier by railroad, while engaged in commerce between any of the several states, shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of the death of such employe to his personal representative for the benefit of the surviving widow and children of such employe, for such injury or death, resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, or other equipment.

That in all actions brought against any such common carrier by railroad, under this act, to recover damages for personal injuries, or where such injuries result in his death, the fact that such employe may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

6.

The Supreme Court of Nebraska erred in holding that the trial court did not err in giving to the jury on its own motion instruction No. 10, which reads as follows:

"If, under the evidence and these instructions, you find for the plaintiff, then I charge you that the measure of the damages, the amount plaintiff is entitled to recover, is such sum as will compensate the widow and minor children of the deceased, Charles M. Cradit, in whose behalf the plaintiff sues, for the pecuniary loss, if any, that they may have suffered by reason of the death of said Charles M. Cradit, less such sum, if any, you find such damages should be diminished by reason of contributory negligence on the part of the said Charles M. Cradit. The law does not permit the recovery of remote or speculative damages, or damages as
527 punishment. In determining what the amount of the recovery should be, you are entitled to take into consideration the occupation of the deceased, his earning capacity at his occupation, and the reasonable probability, as shown by the evidence, of his future earnings; and in this connection you are entitled to con-

sider the Carlisle Tables of Expectancy introduced in evidence and showing the reasonable expectancy of life of a healthy person of the age of thirty-one years to be 33 and 68/100 years."

7.

The Supreme Court of Nebraska erred in holding that the trial court did not err in giving to the jury on its own motion instruction No. 15, which reads as follows:

"It is a question of fact for you, Gentlemen of the Jury, to determine from the evidence, whether the injury that caused the death of Charles M. Cradit was because of the negligence of the defendant company.

The defendant company acts by its agents and employes, and is chargeable with the results of its agents and employes in the management and operation of its trains. The presumption, in the absence of any evidence, is that neither party was negligent or careless; that the defendant company and its employes exercised reasonable care, prudence, and consideration for the employes engaged in the management and running of its trains; also that the deceased, Charles M. Cradit, used like care, prudence and consideration to protect himself and avoid injury while employed by defendant in the operation of its trains. This presumption continues as to both the deceased and the defendant until the contrary is shown by the evidence.

The degree of care required of the defendant in protecting the deceased from injury was the adoption of all reasonable means and precautions to provide for the safety of the deceased while he was engaged in his employment, and this degree of care is to be measured by the dangers to be apprehended or avoided.

The defendant was under obligation to not expose the deceased, in conducting its business, to perils or hazards which the defendant could have guarded against by proper diligence.

The engineer on train 501, the dispatcher and assistant superintendent at Sidney, all represented the defendant in their respective stations, and any failure upon their part, or upon the part of either of them, in the exercise of such reasonable diligence, caution and foresight as an ordinarily prudent man would exercise under similar circumstances to guard the deceased from injury, was negligence of the defendant.

In determining the question of the defendant's negligence, if any, it is competent for you to consider the character and severity of the storm at the time and place of the collision; the block signals maintained by defendant to give warnings of danger; the ability of persons to see signals by lantern, fuseses, and torpedoes; the orders, if any, that were given by the dispatcher and the assistant superintendent at Sidney, or by either of them, the knowledge, if any, that either the dispatcher or the assistant superintendent had as to the severity of the storm; of the ability or inability of the train men to see the block signals and other signals at the time they gave any orders as to the running of the three trains in question, if they or either of them gave any orders; the degree of diligence or lack of diligence they are

shown to have exercised to avoid injury to the deceased; that care or lack of care on the part of the engineer running train Extra 501 to see train Extra 504 and avoid running into it.

528 On the part of the deceased, it is competent for you to consider his opportunities to discover and avoid the danger to which he might be exposed; his conduct in the matter of precaution or lack of precaution in flagging the train he was on, to avoid its being run into by train Extra 501, and thereby avoid danger. In short, you will consider all the facts and circumstances shown in the testimony bearing upon the conduct of the defendant and the deceased.

If, upon consideration of all the testimony, you find that the injury which caused the death of Charles M. Cradit was the proximate result of the negligence of the defendant or its employes, then you should find for plaintiff as directed in instruction No. 10."

8.

The Supreme Court of Nebraska erred in holding that the trial court did not err in giving to the jury on its own motion instruction No. 16, which reads as follows:

"As one of its defenses the defendant pleads what is known and called assumption *or* risk. You are instructed as a matter of law that a servant or employe assumes the ordinary risks and dangers incident and peculiar to the employment upon which he enters, but he does not assume any risk or dangers due to the master's or employer's negligence, nor does he assume risks or dangers arising from sudden, unforeseen circumstances, not ordinarily incident to his employment.

The employer relies, as he has the legal right to do, upon the presumption that due care will be exercised by each employe to avoid injury to himself, and by each employe to avoid injury to his co-employes.

In this case, when the deceased accepted his employment as brakeman for the defendant company he assumed all the risks and hazards incident and peculiar to the business of brakeman in the business of operating and running trains and handling cars by the defendant company in its business of carrying on interstate commerce by railroad.

It is for you, Gentlemen of the Jury, to determine from all the evidence in this case, from all the facts and circumstances shown on the trial, whether or not the injury and death of the deceased, Charles M. Cradit, was because of the risks and hazards incident and peculiar to the employment in which he was engaged.

If, from all the evidence, you find that the injury and death of the said Charles M. Cradit was due to and the result of the risks and hazards incident and peculiar to the business of brakeman in the operation and running of trains, then plaintiff cannot recover herein; and if you so find, you will return a verdict for the defendant."

9.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 1 requested by the defendant, which reads as follows:

"You are instructed to return a verdict for the defendant."

529

10.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 2 requested by the defendant, which reads as follows:

"You are instructed that plaintiff has failed to sustain by sufficient proof the allegation in the petition that Train Dispatcher, W. A. Borton, was negligent in ordering Extra 501 East to follow Extra 504 East from Dix, Nebraska, to Sidney, Nebraska, and in close proximity to Extra 504 East, and you are, therefore, instructed that you cannot base any verdict in this case against the defendant upon that allegation of negligence."

11.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 3 requested by the defendant, which reads as follows:

"You are instructed that the action of the defendant in permitting Extra 501 East to leave Potter on the night of the wreck before Extra 504 East left Mile Post 426 was not the proximate cause of the death of Charles M. Credit and, you are, therefore, instructed that you must not base any verdict against the defendant in this case upon that action."

12.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 4, requested by the defendant, which reads as follows:

"You are instructed that the evidence of the plaintiff is not sufficient to show any negligence on the part of G. D. Sage, Assistant Superintendent at Sidney, Nebraska, in ordering Extra 510 West to proceed west from Sidney, Nebraska, at 1:10 A. M. on March 14, 1913, and you are, therefore, instructed that you must not base any verdict against the defendant upon that action."

13.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 5 requested by the defendant, which reads as follows:

"You are instructed that the evidence shows that the action of G. D. Sage, Assistant Superintendent at Sidney, Nebraska, in ordering Extra 510 to proceed west from Sidney, Nebraska, at 1:10 A. M.

March 14th, 1913, was not the proximate cause of the death of Charles M. Cradit, and you are, therefore, instructed that you must not base any verdict that you might return against the defendant in this case upon that action."

14.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 6 requested by the defendant which reads as follows:

530 "You are instructed that the plaintiff failed to show that there was any negligence on the part of the defendant by reason of the action of W. A. Borton, Train Dispatcher, at Sidney, Nebraska, in ordering Extra 504 East to pick up the engine of 510 West at Mile Post 426, and you are, therefore, instructed that you must not base any verdict against the defendant in this case upon that action."

15.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 7 requested by the defendant, which reads as follows:

"You are instructed that the act of the defendant in ordering Extra 504 East to pick up the engine of Extra 510 West at Mile Post 426 was not the proximate cause of the death of Charles M. Cradit and you are, therefore, instructed that you must not base any verdict in this case against the defendant upon that action."

16.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 8 requested by the defendant, which reads as follows:

"You are instructed that the plaintiff herein has failed to show any negligence upon the part of the defendant in failing to take on the Conductor of Extra 501 East at Potter, Nebraska."

17.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 9, requested by the defendant, which reads as follows:

"You are instructed that the absence of the conductor of Extra 501 East from his train after it left Potter, Nebraska, was not the proximate cause of the death of Charles M. Cradit, and you are, therefore, instructed that you must not base any verdict that you might find against the defendant in this case upon that fact."

18.

The Supreme Court of Nebraska erred in holding that the trial

court did not err in refusing to give to the jury therein instruction No. 11 requested by the defendant, which reads as follows:

"You are instructed that the evidence fails to show that the defendant herein was guilty of any negligence toward Charles M. Cradit in running by signals with Extra 501 East at the time of the wreck."

19.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction

No. 18 requested by the defendant, which reads as follows:

531 "You are instructed that the evidence in this case shows that the death of Charles M. Cradit resulted from dangers and risks which were assumed by him and that, therefore, the plaintiff cannot recover in this case."

20.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 21 requested by the defendant, which reads as follows:

"You are instructed that, under the evidence in this case, the law presumes that the dangers and risks incident to the operation of Extra 504 East and Extra 501 East were as open, apparent and obvious to the said Charles M. Cradit as they were to the defendant in this case, and you are further instructed that when the said Charles M. Cradit continued in the employment of this defendant with that knowledge, he assumed all of the risks and dangers incident to the operation of said trains at the time of the wreck."

21.

The Supreme Court of Nebraska erred in holding that Charles M. Cradit, deceased, did not assume any of the dangers and risks arising from the operation of trains known as Extra 501 East, Extra 504 East and Extra 510 West, on the night of his death, thereby denying to the defendant a right, privilege and immunity granted to it under an act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to the Employes in Certain Cases," commonly known as the Federal Employers' Liability Act, approved April 22d, 1908.

22.

The Supreme Court of Nebraska erred in holding that the trial court did not err in submitting to the jury the question whether or not defendant was negligent in operating the three freight trains known as Extra 501 East, Extra 504 East, and Extra 510 West, on the night of the death of Charles M. Cradit, deceased.

23.

The Supreme Court of Nebraska erred in holding that Charles M. Cradit, the deceased, did not assume any of the dangers and risks

arising from the alleged action of the defendant in permitting train known as Extra 501 East to run in close proximity to train known as Extra 504 East, thereby denying to the defendant a right, privilege and immunity granted to it under an act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," commonly known as the Federal Employers' Liability Act, approved April 22d, 1908.

24.

The Supreme Court of Nebraska erred in holding that Charles M. Cradit, the deceased, did not assume the dangers and risks arising from the act of the Assistant Superintendent at Sidney, Nebraska, in sending out from Sidney, Nebraska, the west bound train known as Extra 510 West, and thereby denying to the defendant a right, privilege and immunity granted to it under an act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," commonly known as the Federal Employers' Liability Act, approved April 22d, 1908.

25.

The Supreme Court of Nebraska erred in holding that Charles M. Cradit, deceased, did not assume the risks and dangers arising from the acts of the engineer of Extra 501 East in running past the block signals on the night of the death of said Charles M. Cradit, deceased, and thereby denying to the defendant a right, privilege and immunity granted to it under an act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," commonly known as the Federal Employers' Liability Act, approved April 22d, 1908.

26.

The Supreme Court of Nebraska erred in holding that the acts of the defendant of which the plaintiff complains in order to constitute actionable negligence under the provisions of the act of Congress, commonly known as the Federal Employers' Liability Act, approved April 22d, 1908, need not be casual or one of the concurring proximate causes of the injury, but need only contribute thereto.

533 Wherefore, said Union Pacific Railroad Company prays that said judgment of the Supreme Court of the State of Nebraska dated March 4th, 1916, and concerning which a motion for a rehearing was denied on the 29th day of April, 1916, be reversed and judgment rendered in favor of the defendant and for costs.

UNION PACIFIC RAILROAD COMPANY,
By N. H. LOOMIS,
EDSON RICH,
A. G. ELLICK,

Its Attorneys.

534 [Endorsed:] 18439. In the Supreme Court of the State of Nebraska. Chas. M. Hadley, as Adm'r of the Estate of Chas. M. Cradit, Deceased, Plaintiff & Appellee, vs. Union Pacific R. R. Company, Defendant & Appellant. Assignment of Errors. Supreme Court of Nebraska. Filed May 2, 1916. H. C. Lindsay, Clerk.

535 And on the same day there was filed in the office of the clerk of the said supreme court by the said Union Pacific Railroad Company a Supersedeas Bond in the sum of \$20,000.00, which said bond was on said day duly approved by Hon. A. M. Morrissey, Chief Justice of the supreme court of Nebraska, and copy of the said bond with the approval thereof is hereto attached.

536 In the Supreme Court of the State of Nebraska.

General No. 18439.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,

vs.

CHARLES M. HADLEY, as Administrator of the Estate of Charles M. Cradit, Deceased, Defendant in Error,

Bond.

Know all Men by these Presents, That we, Union Pacific Railroad Company as principal and National Surety Company as surety, are held and firmly bound unto Charles M. Hadley, as Administrator of the Estate of Charles M. Cradit, Deceased, in the sum of Twenty Thousand Dollars (\$20,000.00), to be paid to the said Charles M. Hadley, as Administrator of the Estate of Charles M. Cradit, Deceased, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 2nd day of May, 1916.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Kansas;

Now, Therefore, The condition of this obligation is such, that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

UNION PACIFIC RAILROAD CO.,

Principal,

(Signed) By A. G. ELLICK, *Its Attorney.*

[SEAL.]

NATIONAL SURETY COMPANY,

Surety,

By HARRY L. MALLO,

Its Attorney in Fact.

537 Bond approved, and to operate as a supersedeas.

Dated May 2nd, 1916.

(Signed)

A. M. MORRISSEY,

Chief Justice Supreme Court of Nebraska.

538 And on the same day, to-wit, the 2nd day of May, 1916, there was issued out of the Supreme Court of the United States by R. C. Hoyt, clerk of the district court of the United States for the district of Nebraska, a Writ of Error, which said Writ of Error was on said day duly allowed by Hon. A. M. Morrissey, Chief Justice of the supreme court of Nebraska, and the same was on the said day duly filed in the office of the clerk of said supreme court. Said original Writ of Error so issued and allowed is hereto attached.

539

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Charles M. Hadley, as Administrator of the Estate of Charles M. Cradit, Deceased, and Union Pacific Railroad Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Union Pacific Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme

540 Court of United States, together with this writ, so that you have the same in the said Supreme-Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 2nd day of May, in the year of our Lord one thousand nine hundred and sixteen.

[Seal United States District Court, District of Nebraska,
Omaha Division.]

R. C. HOYT,

*Clerk of the District Court of the
United States for the District of Nebraska,*
By JOHN NICHOLSON, *Deputy.*

Allowed, May 2nd, 1916.

A. M. MORRISSEY,

Chief Justice Supreme Court of Nebraska.

541 [Endorsed:] 18439. Writ of Error. Supreme Court of
Nebraska. Filed May 2, 1916. H. C. Lindsay, Clerk.

542 And on the said day, to-wit, the 2nd day of May, 1916,
there was issued out of the supreme court of Nebraska a Citation, which Citation was on May 3rd, 1916, duly returned with service thereof acknowledged and duly filed in the office of the clerk of said supreme court.

The said original Citation with service thereof acknowledged is hereto attached.

543 *Citation.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States to Charles M. Hadley, as Administrator of the Estate of Charles M. Cradit, Deceased, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Nebraska, wherein Union Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Nebraska, this 2nd day of May, 1916.

A. M. MORRISSEY,

Chief Justice Supreme Court of Nebraska.

Attest:

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,

Clerk Supreme Court of Nebraska.

LINCOLN, NEBRASKA, May 3, 1916.

We, attorneys of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

JOHN J. HALLIGAN,

W. T. WILCOX,

R. W. DEVOE &

J. M. SWENSON,

*Attorneys for Chas. W. Hadley, as Adm'r of the
Estate of Chas. M. Cradit, Deceased.*

544 [Endorsed:] 18439. Hadley v. Union Pacific R. Co.
Citation. Supreme Court of Nebraska. Filed May 3, 1916.
H. C. Lindsay, Clerk.

545 And on said day, to-wit, May 3rd, 1916, there was filed in the office of the clerk of said supreme court a certain Præcipe, requesting the preparation of a transcript herein, with acknowledgment of service of said Præcipe endorsed thereon.

Said original Præcipe with service thereof is attached hereto.

546 In the Supreme Court of the State of Nebraska.

No. 18439.

CHARLES M. HADLEY, Adm'r of the Estate of Charles M. Cradit, Deceased, Appellee,

v.

UNION PACIFIC RAILROAD COMPANY, Appellant.

*Præcipe for Transcript on Writ of Error to the United States
Supreme Court.*

Comes now the Union Pacific Railroad Company and requests the clerk of the above entitled court to prepare a transcript of the proceedings and record in the above entitled case upon writ of error to the supreme court of the United States and incorporate therein the following matters:

Petition	District Court.
Answer	" "
Reply	" "
Order and jury impaneled in	" "
Instructions to jury	" "
Instructions requested by defendant	" "
Instruction No. 22 asked by defendant	" "
Trial proceeded. Journal entry	" "
Defendant's exceptions to instructions	" "
Verdict and special findings of the jury returned	" "
Special findings requested by defendant	" "
Special finding requested by defendant	" "

Motion for a new trial	District Court.
Motion to specify apportionment of remittitur	" "
Remittitur	" "
Remittitur	" "
547 Judgment	" "
Undertaking on appeal	" "
Certificate of clerk of district court	" "

Complete bill of exceptions.

Assignments of errors in appellant's brief in supreme court.

Paragraphs I, VI, VII, VIII and XI of the argument in appellant's brief.

Full transcript of proceedings in supreme court and opinion and motion for rehearing.

Subdivision "d" of Supreme Court Rule 8.

UNION PACIFIC RAILROAD
COMPANY,

By N. H. LOOMIS,
EDSON RICH,
A. G. ELLICK, *Its Attorneys.*

Service of the above præcipe hereby acknowledged this 3 day of May, 1916.

JOHN J. HALLIGAN,
W. T. WILCOX,
R. W. DEVOE, &
J. M. SWENSON,

*Attorneys for Charles M. Hadley, Adm'r of the
Estate of Charles M. Cradit, Deceased.*

548 [Endorsed:] 18439. Hadley v. Union Pacific Railroad
Co. Præcipe for Transcript & Proof of Service. Supreme
Court of Nebraska. Filed May 3, 1916. H. C. Lindsay, Clerk.

549 *Certificate of Lodgment.*

SUPREME COURT,

State of Nebraska, ss:

I, H. C. Lindsay, Clerk of the said court, do hereby certify that there was lodged with me as such clerk on May 2d, 1916, in the matter of Union Pacific Railroad Company, versus Charles M. Hadley, as Administrator of the Estate of Charles M. Cradit, Deceased:

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for Charles M. Hadley, Administrator, defendant in error, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Lincoln, Nebraska, this May 19, 1916.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

550 [Endorsed:] Certificate of Lodgment.

551 *Authentication of Record.*

SUPREME COURT,
State of Nebraska, ss:

I, H. C. Lindsay, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 547 inclusive, are a true, full, and complete copy of the records and proceedings in the case of Charles M. Hadley, as administrator of the estate of Charles M. Cradit, deceased, Plaintiff, vs. Union Pacific Railroad Company, Defendant, as requested in the original præcipe for transcript attached hereto and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this May 19, 1916.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

552 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case as requested and called for in the præcipe for transcript attached hereto, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Nebraska, at Lincoln, this May 19, 1916.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

Costs of this transcript	\$138.50
Three certificates & stamps	1.80
Binding50
Express50
	<hr/>
	\$141.30

Paid by Union P. R. Co.

H. C. LINDSAY.

Endorsed on cover: File No. 25,316. Nebraska Supreme Court. Term No. 495. Union Pacific Railroad Company, Plaintiff in Error, vs. Charles M. Hadley, as Administrator of the Estate of Charles M. Cradit, deceased. Filed May 27th, 1916. File No. 25,316.

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1918

No.  174

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

CHARLES M. HADLEY, as Administrator
of the Estate of CHARLES M. CRADY,
Deceased,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF
THE STATE OF NEBRASKA.

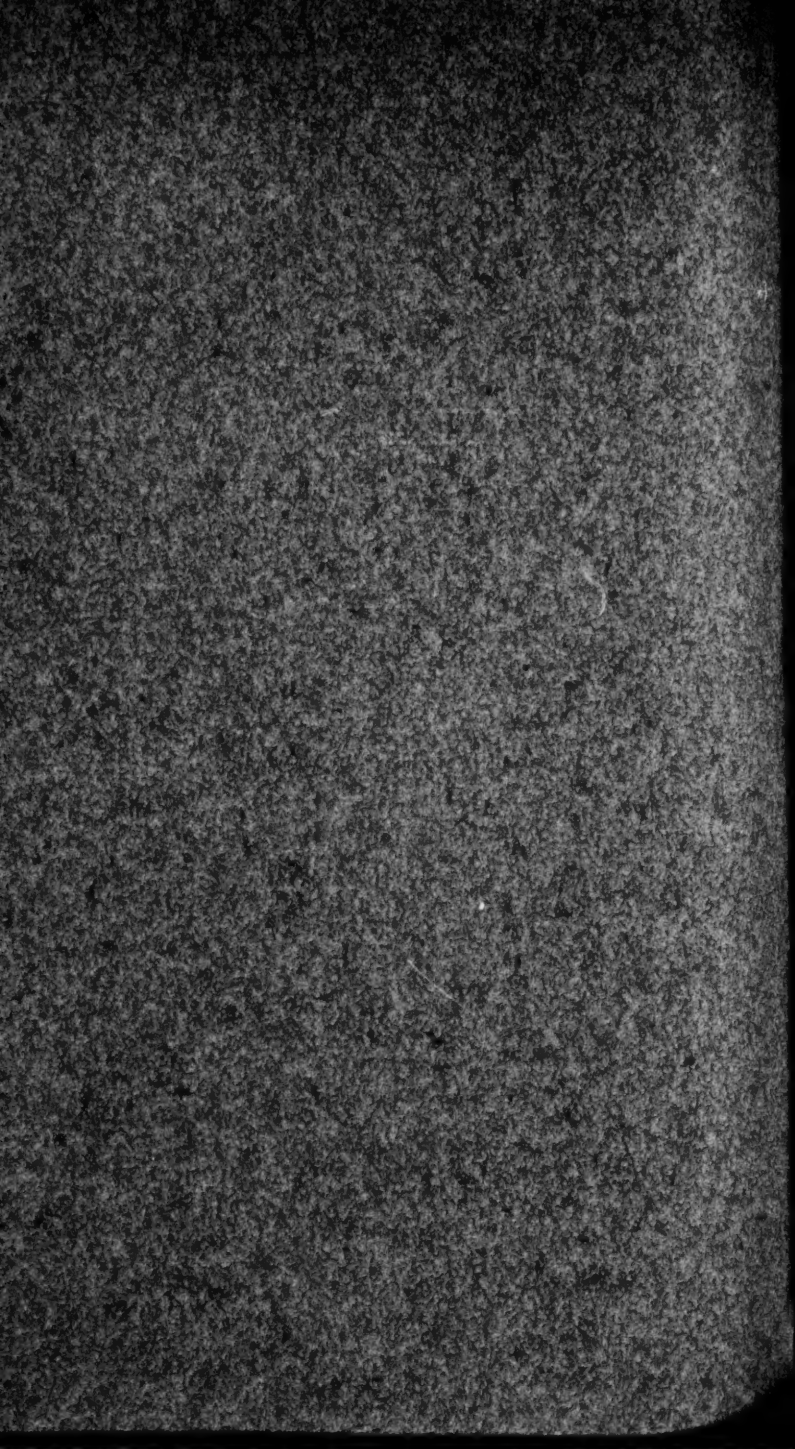
BRIEF OF PLAINTIFF IN ERROR.

N. E. LOOMIS,

Attorney for Plaintiff in Error.

ALBION B. BROWN, Jr.,

(55316)



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**IN THE SUPREME COURT
OF THE
UNITED STATES**

OCTOBER TERM, 1916.

No. 495

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VS.

CHARLES M. HADLEY, AS ADMINISTRATOR
OF THE ESTATE OF CHARLES M. CRADIT,
DECEASED,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF
THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

**CONCISE ABSTRACT OR STATEMENT OF
THE CASE.**

This action was begun in the District Court of Cheyenne County, Nebraska, by Charles M. Hadley, as Administrator of the Estate of Charles M. Cradit, Deceased, against Union Pacific Railroad Company, under an Act of Congress, entitled "An Act Relating to the Liability of Com-

mon Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908, known as The Federal Employers' Liability Act, 35 Statutes at large 65; Vol. 4 U. S. Compiled Statutes, 1913, Section 8657, to recover damages suffered by the widow and two minor children of the said Charles M. Cradit, resulting from his death while employed in Interstate Commerce as a freight brakeman on one of the freight trains of said Railroad Company.

The deceased at the time of his death, viz., about 4:10 A. M. on March 14, 1913, was ~~the~~ rear brakeman upon a freight train moving from Cheyenne, Wyoming, eastward to Sidney, Nebraska, known as Extra 504 East, which, with the knowledge of Cradit, was being followed in close proximity all the way from Cheyenne; by another freight train known as Extra 501 East.

In its progress eastward, Cradit's train stopped near a telegraph station known as Mile Post 426, a distance of ninety miles from Cheyenne, for a period of from thirty to forty minutes. During said period Cradit and his conductor remained in their caboose discussing the severity of a snow-storm, which was then in progress, and joking about the likelihood of being struck by the following train. Although they knew of the proximity of the following train, they failed and neglected to protect and flag the rear end of their train against said train as was the imperative duty of each of them under the rules of the Railroad Company. As a consequence, the following freight

train collided with the caboose of Cradit's train at 4:10 A. M., instantly killing Cradit, three stockmen, who were passengers in Cradit's caboose, and the conductor of said train, and seriously injuring two other stockmen, who were likewise passengers in Cradit's caboose.

The jury in a special finding declined to make any deduction of the gross damages on account of the contributory negligence of the deceased, which the trial court had instructed them they must do.

A verdict was returned against the Railroad Company in the sum of \$25,000.00, which was reduced to \$15,000.00 by the trial judge, ostensibly because the jury had failed to make any deduction on account of the contributory negligence of Cradit, which the trial court instructed the jury the evidence established. Upon appeal to the Supreme Court of Nebraska, the judgment was further reduced to \$13,500.00, because it was held that the gross damages determined by the jury were excessive and that the trial court had not made proper deduction for the contributory negligence of the deceased.

FEDERAL QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

1. The Supreme Court of Nebraska erred in holding that there is evidence in the record sufficient to establish liability on the part of the

plaintiff in error under the Federal Employers' Liability Act.

This question was raised in the trial court by a motion for a directed verdict which was overruled, and the ruling duly excepted to; also by a requested instruction to direct a verdict for plaintiff in error, the refusal of which was duly excepted to. This action of the trial court was challenged as error in the State Supreme Court as a denial of rights, privileges and immunities granted to plaintiff in error under the Federal Employers' Liability Act, and was expressly passed upon adversely to plaintiff in error in said court.

2. The Supreme Court of Nebraska erred in approving the action of the trial court in holding that the evidence in the record was sufficient to establish liability under the Federal Employers' Liability Act of the plaintiff in error on each of five of the acts of negligence submitted to the jury, and in submitting each of said charges of negligence to the jury with instructions that a verdict could be based upon any one thereof.

These questions were raised in the trial court by exceptions to the refusal of said court to give to the jury separate requested instructions withdrawing from their consideration each of such acts of negligence on the ground that the evidence was insufficient to sustain each thereof; also by exceptions to an instruction given to the jury by the court on its own motion to the effect that they could base a verdict against plaintiff in error

upon any one of such acts of negligence. This action of the trial court was challenged in the State Supreme Court on the ground that it denied to plaintiff in error rights, privileges and immunities granted to it under the Federal Employers' Liability Act, which contention was passed upon adversely to plaintiff in error by said court.

3. The Supreme Court of Nebraska erred in approving the action of the trial court in instructing the jury that under the law governing said case, a servant or employee does not assume any risks or dangers arising from negligence of the master or employer, thereby denying to plaintiff in error the defense of assumption of extraordinary risks available to it under the Federal Act.

This question was presented by the evidence in the case, was raised in the trial court by exceptions to the instructions of said court as aforesaid. The same question was raised in the State Supreme Court by an assignment of error challenging the action of the trial court in that behalf and was expressly passed upon by the State Supreme Court adversely to the plaintiff in error.

4. The Supreme Court of Nebraska erred in holding that there was no evidence in the record sufficient to raise the issue of assumption of risk of any of the acts of negligence charged in the petition.

This question was raised in the trial court by challenging the sufficiency of the evidence to

establish liability upon each of the acts of negligence charged, and by an exception to an instruction given by said court to the jury on its own motion denying to the plaintiff in error the benefits of such defense.

This question was raised in the State Supreme Court and passed on adversely to plaintiff in error in the opinion of that court, and was again specifically challenged in a motion for a re-hearing in said court which was overruled.

5. The Supreme Court of Nebraska erred in approving the action of the trial court in determining and fixing the amount that the gross damages should be reduced on account of the contributory negligence of the deceased, after the jury had expressly refused to make any such reduction, although instructed to do so by the court.

This question was raised by a motion for a new trial in the trial court, and by challenging the action of the trial court in the assignments of error and brief filed in the State Supreme Court, and was passed on adversely to plaintiff in error in each court.

6. The Supreme Court of Nebraska erred in holding that in an action under the Federal Employers' Liability Act, where the court has instructed the jury that contributory negligence on the part of the employee has been shown, but the jury makes no deduction in the amount of the

verdict because of such negligence, the court may order such remittitur as seems proper under the evidence, and in doing so, instead of remanding said cause to the trial court for a proper reduction therefor by a jury.

This question was raised in the assignments of error and brief of plaintiff in error, filed in the State Supreme Court, challenging like action on part of the trial court, and in a motion for a rehearing filed in the Supreme Court after the Supreme Court had so held and ordered the remittitur, which was overruled.

7. The Supreme Court of Nebraska erred in holding that to permit the defendant in error to recover under the Federal Employers' Liability Act, defendant in error need not establish that the acts of plaintiff in error, of which complaint is made, were causal, or one of the concurrent proximate causes of the injury, but need only establish that such acts contributed thereto.

This question was raised in the trial court by exceptions to Instruction Number 15, given by the court to the jury on its own motion, and in the State Supreme Court by a motion for a rehearing, and brief in support thereof, after the foregoing rule had been announced, applied and followed in the opinion of the State Supreme Court to sustain the judgment of the trial court, which motion was overruled.

8. The Supreme Court of Nebraska erred in approving the instruction of the trial court to

the effect that the widow and minor children of the deceased would be permitted to recover such damages as they "may have suffered" on account of the death of the deceased, instead of such damages as they "did" suffer.

This question was raised in the trial court by an exception to Instruction No. 10 setting forth the above rule, which manner of raising the question is sufficient under the practice in Nebraska; and was raised in the State Supreme Court by an assignment of error challenging such instruction.

SPECIFICATION OF ERRORS RELIED UPON.

The errors relied upon herein are designed by number as same are numbered in the assignment of errors filed in the State Supreme Court, and found on Pages 310 to 318, inclusive, of the Transcript of Record herein, as follows:

2.

The Supreme Court of Nebraska erred in holding that there was sufficient evidence introduced at the trial of said cause in the District Court of Cheyenne County, Nebraska, to sustain a verdict of the jury in favor of the plaintiff and against the defendant under the act of Congress, entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908,

commonly known as the Federal Employers' Liability Act, and the amendments thereto.

3.

The Supreme Court of Nebraska erred in fixing and determining the amount that the gross damages suffered by the plaintiff should be diminished on account of the contributory negligence of Charles M. Cradit, Deceased, thereby denying to the Union Pacific Railroad Company, appellant in said court, a right, privilege and immunity granted to it by section 3 of an act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," commonly known as the Federal Employers' Liability Act, approved April 22, 1908, wherein it is provided as follows:

"That in all actions hereafter brought against any such common carrier by railroad, under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee;"

and a right granted to said Union Pacific Railroad Company under the provisions of the Seventh Amendment to the Constitution of the United

States, wherein it is provided that in suits at law where the value in controversy shall exceed \$20.00, the right of trial by jury shall be preserved.

4.

The Supreme Court of Nebraska erred in holding that the trial court did not err in giving to the jury on its own motion instruction No. 5, which reads as follows:

"The gist of plaintiff's action is that the death of Charles M. Cradit was caused by the negligence of the defendant Railroad Company in the operation of its trains on its tracks at or near what was called Mile Post 426 on the night of March 13 and 14, 1913. Facts which are alleged by one party and admitted by the other in the pleadings do not require any proof; so that the negligence of the defendant, and that such negligence was the cause of the injury to Charles M. Cradit that resulted in his death, and that his death was not the result of his own negligence, are among the decisive questions for you to pass upon in this case.

It rests upon the plaintiff to prove by a preponderance of the evidence the facts necessary for his recovery; that is, that the death of Charles M. Cradit resulted from an injury inflicted upon him by the defendant Railroad Company in the negligent and careless operation of its railroad in running

its trains at the time and place set out in the petition.

If the plaintiff establishes this fact by a fair preponderance of the evidence, then the burden will rest upon the defendant to establish by a fair preponderance of the evidence that the negligence and carelessness of the said Charles M. Cradit was the proximate cause of the injury that resulted in his death, or that his negligence contributed to his injury and death."

5.

The Supreme Court of Nebraska erred in holding that the trial court did not err in giving to the jury on its own motion instruction No. 6, which reads as follows:

"This action is brought under what is called the Employers' Liability Act, a law passed by the United States Congress, which law provides that every common carrier by railroad, while engaged in commerce between any of the several states, shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of the death of such employee to his personal representative for the benefit of the surviving widow and children of such employee, for such injury or death, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to

its negligence, in its cars, engines, appliances, machinery, track, road bed, or other equipment.

That in all actions brought against any such common carrier by railroad, under this act, to recover damages for personal injuries, or where such injuries result in his death, the fact that such employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

6.

The Supreme Court of Nebraska erred in holding that the trial court did not err in giving to the jury on its own motion instruction No. 10, which reads as follows:

"If, under the evidence and these instructions, you find for the plaintiff, then I charge you that the measure of the damages, the amount plaintiff is entitled to recover, is such sum as will compensate the widow and minor children of the deceased, Charles M. Cradit, in whose behalf the plaintiff sues, for the pecuniary loss, if any, that they may have suffered by reason of the death of said Charles M. Cradit, less such sum, if any, you find such damages should be diminished by reason of contributory negligence on the part of the said Charles M. Cradit. The law does not permit the recovery of remote or speculative

damages, or damages as punishment. In determining what the amount of the recovery should be, you are entitled to take into consideration the occupation of the deceased, his earning capacity at his occupation, and the reasonable probability, as shown by the evidence, of his future earnings; and in this connection you are entitled to consider the Carlisle Tables of Expectancy introduced in evidence and showing the reasonable expectancy of life of a healthy person of the age of thirty-one years to be 33 and 68-100 years."

7.

The Supreme Court of Nebraska erred in holding that the trial court did not err in giving to the jury on its own motion instruction No. 15, which reads as follows:

"It is a question of fact for you, Gentlemen of the Jury, to determine from the evidence, whether the injury that caused the death of Charles M. Cradit was because of the negligence of the defendant company.

The defendant company acts by its agents and employees, and is chargeable with the results of its agents and employees in the management and operation of its trains. The presumption, in the absence of any evidence, is that neither party was negligent or careless; that the defendant company and its employees exercised reasonable care, prudence, and consideration for the employees engaged in the

management and running of its trains; also that the deceased, Charles M. Cradit, used like care, prudence and consideration to protect himself and avoid injury while employed by defendant in the operation of its trains. This presumption continues as to both the deceased and the defendant until the contrary is shown by the evidence.

The degree of care required of the defendant in protecting the deceased from injury was the adoption of all reasonable means and precautions to provide for the safety of the deceased while he was engaged in his employment, and this degree of care is to be measured by the dangers to be apprehended or avoided.

The defendant was under obligation to not expose the deceased in conducting its business, to perils or hazards which the defendant could have guarded against by proper diligence.

The engineer on train 501, the dispatcher and assistant superintendent at Sidney, all represented the defendant in their respective stations, and failure upon their part, or upon the part of either of them, in the exercise of such reasonable diligence, caution and foresight as an ordinarily prudent man would exercise under similar circumstances to guard the deceased from injury, was negligence of the defendant.

In determining the question of the defendant's negligence, if any, it is competent for you to consider the character and severity

of the storm at the time and place of the collision; the block signals maintained by defendant to give warnings of danger; the ability of persons to see signals by lantern, fusees, and torpedoes; the orders, if any, that were given by the dispatcher and the assistant superintendent at Sidney, or by either of them, the knowledge, if any, that either the dispatcher or the assistant superintendent has as to the severity of the storm; of the ability or inability of the train men to see the block signals and other signals at the time they gave any orders as to the running of the three trains in question, if they or either of them gave any orders; the degree of diligence or lack of diligence they are shown to have exercised to avoid injury to the deceased; that care or lack of care on the part of the engineer running train Extra 501 to see train Extra 504 and avoid running into it.

On the part of the deceased, it is competent for you to consider his opportunities to discover and avoid the danger to which he might be exposed; his conduct in the matter of precaution or lack of precaution in flagging the train he was on, to avoid its being run into by train Extra 501, and thereby avoid danger. In short, you will consider all the facts and circumstances shown in the testimony bearing upon the conduct of the defendant and the deceased.

If, upon consideration of all the testimony, you find that the injury which caused the death of Charles M. Cradit was the

proximate result of the negligence of the defendant or its employees, then you should find for plaintiff as directed in instruction No. 10."

8.

The Supreme Court of Nebraska erred in holding that the trial court did not err in giving to the jury on its own motion instruction No. 16, which reads as follows:

"As one of its defenses the defendant pleads what is known and called assumption of risk. You are instructed as a matter of law that a servant or employee assumes the ordinary risks and dangers incident and peculiar to the employment upon which he enters, but he does not assume any risk or dangers due to the master's or employer's negligence, nor does he assume risks or dangers arising from sudden, unforeseen circumstances, not ordinarily incident to his employment.

The employer relies, as he has the legal right to do, upon the presumption that due care will be exercised by each employee to avoid injury to himself, and by each employee to avoid injury to his co-employees.

In this case, when the deceased accepted his employment as brakeman for the defendant company he assumed all the risks and hazards incident and peculiar to the business of brakeman in the business of operating and running trains and handling cars by the de-

fendant company in its business of carrying on interstate commerce by railraod.

It is for you, Gentlemen of the Jury, to determine from all the evidence in this case, from all the facts and circumstances shown on the trial, whether or not the injury and death of the deceased, Charles M. Cradit, was because of the risks and hazards incident and peculiar to the employment in which he was engaged.

If, from all the evidence, you find that the injury and death of the said Charles M. Cradit was due to and the result of the risks and hazards incident and peculiar to the business of brakeman in the operation and running of trains, then plaintiff cannot recover herein; and if you so find, you will return a verdict finding for the defendant."

9.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 1 requested by the defendant, which reads as follows:

"You are instructed to return a verdict for the defendant."

10.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 2 requested by the defendant, which reads as follows:

"You are instructed that plaintiff has failed to sustain by sufficient proof the allegation in the petition that Train Dispatcher, W. A. Borton, was negligent in ordering Extra 501 East to follow Extra 504 East from Dix, Nebraska, to Sidney, Nebraska, and in close proximity to Extra 504 East, and you are therefore, instructed that you cannot base any verdict in this case against the defendant upon that allegation of negligence."

11.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 3 requested by the defendant, which reads as follows:

"You are instructed that the action of the defendant in permitting Extra 501 East to leave Potter on the night of the wreck before Extra 504 East left Mile Post 426 was not the proximate cause of the death of Charles M. Cradit and, you are, therefore, instructed that you must not base any verdict against the defendant in this case upon that action."

12.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 4, requested by the defendant, which reads as follows:

"You are instructed that the evidence of the plaintiff is not sufficient to show any negli-

gence on the part of G. D. Sage, Assistant Superintendent at Sidney, Nebraska, in ordering Extra 510 West to proceed west from Sidney, Nebraska, at 1:10 A. M. on March 14, 1913, and you are, therefore, instructed that you must not base any verdict against the defendant upon that action."

13.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 5 requested by the defendant, which reads as follows:

"You are instructed that the evidence shows that the action of G. D. Sage, Assistant Superintendent at Sidney, Nebraska, in ordering Extra 510 to proceed west from Sidney, Nebraska, at 1:10 A. M., March 14, 1913' was not the proximate cause of the death of Charles N. Cradit, and you are, therefore, instructed that you must not base any verdict that you might return against the defendant in this case upon that action."

14.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 6 requested by the defendant, which reads as follows:

"You are instructed that the plaintiff failed to show that there was any negligence

on the part of the defendant by reason of the action of W. A. Borton, Train Dispatcher, at Sidney, Nebraska, in ordering Extra 504 East to pick up the engine of 510 West at Mile Post 426, and you are, therefore, instructed that you must not base any verdict against the defendant in this case upon that action."

15.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 7 requested by the defendant, which reads as follows:

"You are instructed that the act of the defendant in ordering Extra 504 East to pick up the engine of Extra 510 West at Mile Post 426 was not the proximate cause of the death of Charles M. Cradit and you are, therefore, instructed that you must not base any verdict in this case against the defendant upon that action."

16.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 8 requested by the defendant, which reads as follows:

"You are instructed that the plaintiff herein has failed to show any negligence upon

the part of the defendant in failing to take on the Conductor of Extra 501 East at Potter, Nebraska."

17.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 9 requested by the defendant, which reads as follows:

"You are instructed that the absence of the conductor of Extra 501 East from his train after it left Potter, Nebraska, was not the proximate cause of the death of Charles M. Cradit, and you are, therefore, instructed that you must not base any verdict that you might find against the defendant in this case upon that fact."

18.

The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing to give to the jury therein instruction No. 11 requested by the defendant, which reads as follows:

"You are instructed that the evidence fails to show that the defendant herein was guilty of any negligence toward Charles M. Cradit in running by signals with Extra 501 East at the time of the wreck."

21.

The Supreme Court of Nebraska erred in holding that Charles M. Cradit, Deceased, did not

assume any of the dangers and risks arising from the operation of trains known as Extra 501 East, Extra 504 East and Extra 510 West, on the night of his death, thereby denying to the defendant a right, privilege and immunity granted to it under an act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," commonly known as the Federal Employers' Liability Act, approved April 22, 1908.

22.

The Supreme Court of Nebraska erred in holding that the trial court did not err in submitting to the jury the question whether or not defendant was negligent in operating the three freight trains known as Extra 501 East, Extra 504 East and Extra 510 West, on the night of the death of Charles M. Cradit, Deceased.

23.

The Supreme Court of Nebraska erred in holding that Charles M. Cradit, the deceased, did not assume any of the dangers and risks arising from the alleged action of the defendant in permitting train known as Extra 501 East to run in close proximity to train known as Extra 504 East, thereby denying to the defendant a right, privilege and immunity granted to it under an Act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," commonly

known as the Federal Employers' Liability Act, approved April 22, 1908.

24.

The Supreme Court of Nebraska erred in holding that Charles M. Cradit, the deceased, did not assume the dangers and risks arising from the act of the Assistant Superintendent at Sidney, Nebraska, in sending out from Sidney, Nebraska, the west bound train known as Extra 510 West, and thereby denying to the defendant a right, privilege and immunity granted to it under an act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," commonly known as the Federal Employers' Liability Act, approved April 22, 1908.

25.

The Supreme Court of Nebraska erred in holding that Charles M. Cradit, deceased, did not assume the risks and dangers arising from the acts of the engineer of Extra 501 East in running past the block signals on the night of the death of said Charles M. Cradit, deceased, and thereby denying to the defendant a right, privilege and immunity granted to it under an act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," commonly known as the

Federal Employers' Liability Act, approved April 22, 1908.

26.

The Supreme Court of Nebraska erred in holding that the acts of the defendant of which the plaintiff complains in order to constitute actionable negligence under the provisions of the act of Congress, commonly known as the Federal Employers' Liability Act, approved April 22, 1908, need not be causal or one of the concurring proximate causes of the injury, but need only contribute thereto.

ARGUMENT.

I.

The Supreme Court of Nebraska Erred in Holding that there is Evidence in the Case Sufficient to Establish a Liability under the Federal Employers' Liability Act upon the Acts of Negligence Charged.

This question is presented by errors 2, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the assignment of errors filed in the State Supreme Court, *supra*.

Cradit being employed in interstate commerce at the time of his death, the Federal Employers' Liability Act and the Federal decisions accordingly furnish the exclusive rules of substantive law applicable to this case.

Southern Railway Company vs. Gray, 241
U. S. 333;
Seaboard Air Line Company vs. Horton,
233 U. S. 492;
Central Vermont Railway vs. White, 238
U. S. 507;
Great Northern Railway vs. Wiles, 240 U. S.
444;
Manning vs. Chicago Great Western R. Co.
160 N. W. (Minn.) 787;

In the case of St. Louis vs. McWhirter, 229
U. S. 265, it is held:

“While the power of this court to review the judgment of a state court is controlled by Section 709, Rev. Stat. 237, Judicial Code, yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal statute, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law.”

A consideration of this error requires an analysis of the pleadings and the evidence.

Defendant in error in his petition filed in the trial court, after alleging sufficient facts to bring the case under the Federal Employers' Liability Act, alleges that about 6:10 o'clock P. M. on March 13, 1913, the deceased, Charles M. Cradit, left Cheyenne, Wyoming, for Sidney, Nebraska, as the

rear brakeman of a freight train known as Extra 504 East; that immediately thereafter, the dispatcher of plaintiff in error ordered another freight train known as Extra 501 East to proceed from Cheyenne to Sidney, following and in close proximity to Extra 504 East (Record pp. 2 and 3); that while said trains were enroute between Cheyenne and Sidney, the Assistant Superintendent of plaintiff in error at Sidney ordered a freight train to proceed westward from Sidney to Cheyenne known as Extra 510 West; that during the time said trains were proceeding as indicated, a blizzard was raging between Sidney and Cheyenne with heavy snow falling, blowing and drifting so that one could not see more than fifty feet through it, and to the extent that it was dangerous to run trains closer together than the distance of one telegraph station to another; that Extra 510 West ran out of water when it reached Mile Post 426, and the dispatcher ordered Extra 504 East to pick up the engine of Extra 510 West at Mile Post 426 and bring same to Sidney; that while Extra 504 East was picking up the engine of Extra 510 West, Extra 501 East collided with the caboose of Extra 504 East, killing the deceased. (Record pp. 4, 5 and 6.)

Defendant in error claimed in said petition that the death of Charles M. Cradit was caused by six acts of negligence, viz.:

(a) That the dispatcher who was dispatching trains over the district between Cheyenne, Wyoming, and Sidney, Nebraska, knowing that

the weather conditions made it unsafe to operate trains closer together than the distance of one telegraph station to another, negligently ordered Cradit's train to proceed east from Dix to Sidney, and Extra 501 East to follow Cradit's train to Sidney and in close proximity thereto.

(b) That the Assistant Superintendent of said railroad at Sidney, knowing that the weather conditions then existing made it unsafe to operate trains between Sidney and Cheyenne, negligently ordered a freight train known as Extra 510 West to proceed westward from Sidney to Cheyenne at 1:10 o'clock A. M. on March 14, 1913.

(c) That the dispatcher aforesaid, with knowledge of the weather conditions described above, and of the inability of trainmen to see signals, negligently ordered Cradit's train to stop at Mile Post 426 and pick up engine 510 of Extra 510 West for the purpose of taking it to Sidney.

(d) That, at the time of the collision, Cradit's train and Extra 501 East and Extra 510 West were running without headlights.

(e) That Extra 501 East negligently left Potter, Nebraska, a station west of Mile Post 426, without its conductor, whose duty it was to observe the block signals, thereby depriving said train of the care and management of its conductor.

(f) That, while Extra 501 East was proceeding eastward without a conductor and without a

headlight, it negligently failed to observe the signals immediately to the rear of Cradit's train, and ran into and demolished the caboose of said train. (Record pp. 3, 4, 5, 6.)

Plaintiff in error in its answer, denied that it was negligent in any of the particulars charged in said petition and, affirmatively plead the defenses of contributory negligence and assumption of risk. (Record pp. 7, 8, 9.)

Upon the trial of the case, the uncontradicted evidence was as follows: (Numerical references are to pages of the Transcript of Record, herein.)

The collision in question occurred a train length west of Mile Post 426, which was the designation for a telegraph station at the west end of the continuous double track of the Union Pacific from Omaha. Mile Post 426 was 12 miles west of Sidney. Potter station was 7 miles west of Mile Post 426, and Dix station was 16 miles west of Mile Post 426. Cheyenne, Wyoming, was 102 miles west of Sidney. That portion of the railroad between Sidney and Cheyenne was known as the Fourth District of the Nebraska Division of the Union Pacific. The dispatcher charged with dispatching trains over said Fourth District was stationed at Sidney (224). Said district was equipped with a block signal system consisting of stationary signal posts located at different intervals along its line which would display a red or danger light until a train had traversed a safe distance past said signal post, which light, under

the rules of the company, was a warning to a following train not to pass said signal post, except under certain restrictions, until the red light automatically changed to a green light (56, 115).

Under the rules of your petitioner, it was the duty of the trainmen to keep the dispatcher advised of any unusual weather conditions along the line, and especially of conditions that made it unsafe to operate trains in the manner same were being operated (55, 239); and were required to familiarize themselves with the duties of others, under the rules, as well as themselves, so as to be prepared in case of emergency to act in any capacity to protect the safety of trains. (Rule 751, Record p. 139.)

Cradit's train was a through train consisting of about 40 cars of sheep, known as Extra 504 East, and left Cheyenne for Sidney between 6 and 7 o'clock P. M. on March 13, 1913 (46, 47). The train that collided with Cradit's caboose was also a through freight train, known as Extra 501 East, and left Cheyenne for Sidney at about 7:15 P. M. on said date (99). Cradit was kept advised of the progress of Extra 501 East and also of all other trains moving over the district that were likely to interfere with the progress of his train (230). When these trains left Cheyenne, it was snowing a little with a strong wind from the north (77). As they proceeded eastward, the storm grew worse (47) until, when they reached Dix, the storm had reached its height, and was as bad there as it was at any time during the night,

and at the time of the collision (70, 90). The temperature at no time got much below freezing, but the snow was wet, would stick to the face, and as it fell upon the clothing, would melt and saturate it and then freeze (70, 73). These two trains proceeded to Dix where they pulled up along side of each other on sidings to allow some west bound mail and passenger trains to pass (49).

Upon arrival at Dix, the acetylene headlight of the engine of Cradit's train was out, and, in accordance with the rules of the company (94), a lighted white lantern was placed in front of the reflector in the headlight (78, 79). The headlight on Extra 501 East had been similarly treated at a station west of Dix (100).

While the engines of both trains stood opposite each other at Dix, Cradit went into the engine cab of Extra 501 East with Phillips, his conductor, who there discussed the storm and its effect upon their progress with the engine crew of that train. The engine crew of that train had been having difficulty in seeing the lights in the block signals on account of the storm, and so advised Phillips in the presence and hearing of Cradit, and, as Cradit's train was to precede them out of Dix, they asked Phillips and Cradit to be sure and protect them by throwing out lots of fusees and by putting down some torpedoes in the event Cradit's train should stop for any reason along the route into Sidney, which Phillips in the presence and hearing of Cradit promised to do (188, 205). Dix was the last night telegraph station

before reaching Mile Post 426 (110), but Potter was equipped with a telephone booth for the use of trainmen (54, 103, 242). Neither Cradit nor any one else had advised the dispatcher up to the time Cradit's train left Potter that the severity of the storm was making it difficult for trainmen to observe the block signals or dangerous to continue to operate trains (236, 237, 238, 225). Cradit's train left Dix at 2:35 A. M. (175) and stopped at Potter at 3:05 A. M. to take water, leaving there at 3:15 A. M. (175). Extra 501 East left Dix at 3:06 A. M. (189), and stopped at Potter to take water, leaving there at 3:45 A. M. (189). The conductor of this train failed to get on his caboose as it pulled out of Potter (98). The following train was always held at a station until the preceding train reached the next station (228).

While these trains were enroute from Cheyenne to Sidney, a freight train, known as Extra 510 West, was started west out of Sidney for Cheyenne. When this train reached Mile Post 426 at 3:05 o'clock A. M. (135), it was found that its engine was almost out of water, and, upon this fact being reported to the dispatcher at Sidney, the operator at Mile Post 426 was ordered to stop Cradit's train at that point and direct them to pick up the engine of Extra 510 West and bring it into Sidney (184). When Cradit's train arrived at Mile Post 426 at about 3:35 o'clock A. M. (175), it was stopped, the engineer whistled a signal to the rear brakeman to get out and flag his train (95, 176), and the operator gave the engine crew the above order (59, 87), and the dis-

patcher advised the crew of the following train of the same order (103, 242). The engine of Extra 510 West was to be set into the front end of Cradit's train (87). The head end crews of these two trains were engaged in the work of setting the engine of Extra 510 West into the front end of Cradit's train for a period of from 30 to 40 minutes, during all of which time, Cradit and Phillips, his conductor, remained in the caboose, except to go out on the front platform several times for the purpose of seeing where they had stopped (212, 213). Although Cradit knew that Extra 501 East was following them and was having difficulty in seeing the block signals on account of the storm, and although he and Phillips had promised that they would protect that train with fusees and torpedoes in the event his train should stop, Cradit failed and neglected to protect the rear of his train, either with fusees, torpedoes or in any other manner (189, 214), but sat in the caboose joking with his conductor about the proximity of the following train and the likelihood of being struck thereby (214, 219, 220, 221). Rule 99 of plaintiff in error, with which Cradit had certified over his own signature at the time of his employment that he was familiar, and would obey (274, 275), made it imperative upon a train stopping or being delayed under circumstances in which it may be overtaken by another train, for a brakeman to go back immediately with stop signals a sufficient distance to insure full protection, and required him at one-fourth of a mile from the rear of his train to place one torpedo on the rail, continuing back one-half mile from the rear of

his train where he was obliged to place two torpedoes on the rail two rail lengths apart, then to return to the single torpedo where he must remain until relieved by another brakeman or recalled by the whistle of his engine. During foggy or stormy weather these distances were required to be increased, and red fusees displayed in addition to the torpedoes (136). As a consequence of the failure to flag the rear end of his train as required by the foregoing rule (202), and while he was actually engaged in discussing with the conductor the likelihood of being struck by the following train, the engine crew of Extra 501 East relying upon the promise of Phillips and Cradit that they would protect their train by fusees and torpedoes in the event they should stop, were centering their attention, as they proceeded eastward, on the track ahead of their engine for burning fusees and upon a warning of danger from the explosion of the torpedoes rather than upon the block signals (110, 111, 190, 191), and thereby missed the block signal to the rear of Cradit's train, which indicated the proximity of said train, and collided with Cradit's caboose at 4:10 A. M. (189), killing Cradit, Phillips, three stockmen, and seriously injuring two other stockmen. At the time of the collision Extra 501 East was moving at a rate of 5 or 6 miles per hour (190).

The storm in an about Mile Post 426 and Dix made it difficult at times to see the block signals, but frequent tests made at Sidney during the night by the Chief Dispatcher did not show that condition there (226). A number of trainmen of

many years experience, familiar with the rules of your petitioner and the storm on the night of the collision, and who operated passenger and other trains over the same district on the night of the collision (244, 248, 256), testified that your petitioner had ample rules in force at the time which, if observed by the trainmen, would amply protect the operation of trains under the weather conditions as then existing (245, 246, 250, 267).

We base our claim of non-liability in this case upon two grounds, namely:

1. *The neglect of Cradit in failing to flag the rear of his train under the circumstances was such that there is no justification for a comparison of evidence of negligences or the apportioning of their effect.*

Rule 99 of the Railroad Company in force at the time of the accident, and for many years prior thereto, and with which Cradit certified over his own signature that he was familiar at the time of his employment (Record pp. 274, 275) was in part as follows:

“When a train stops or is delayed under circumstances in which it may be overtaken by another train, a flagman must go back immediately with stop signals a sufficient distance to insure full protection. One-fourth of a mile from the rear of the train he will place one torpedo on the rail, continuing back one-half mile from the rear of his train, he

will place two torpedoes on the rail, two rail lengths appart. He may then return to the single torpedo where he must remain until relieved by another flagman or is recalled by the whistle of his engine. When recalled, if he does not see or hear an approaching train, the single torpedo will be removed (but not before), if conditions warrant, a red fusee must be displayed to protect his train while returning.

During foggy or stormy weather, in the vicinity of obscure curves or descending grades, or if other conditions require it, the flagman will increase the distance." (Record p. 136.)

The evidence is uncontradicted that Cradit failed to conform to this rule of the company. When Cradit's train stopped at Mile Post 426, it stood there for thirty or forty minutes before the collision occurred. He had five passengers aboard his caboose who were depending upon him to protect them against collision from the following train, but made no effort to protect the rear of his train, although he knew Extra 501 East was closely following his train, and discussed that fact and the likelihood of a collision with his conductor, who jokingly remarked, "If she hits us tonight our debts are paid." (214)

He did not even take the precaution of throwing a burning fusee off the rear end of his caboose, which the record shows is so weighted and con-

structed, that it would stand upright and burn with a brilliant flame in any kind of weather (67). This latter action, although far from a compliance with the flagging rule, would have prevented the accident (201).

The trial court in Instruction No. 12 (Record p. 18), instructed the jury "that the evidence in this case shows that the deceased, Charles M. Cradit, was guilty of contributory negligence in not guarding the rear end of his train on its arrival at the station, Mile Post 426."

The State Supreme Court in its opinion said:

"The court properly directed the jury that the deceased was guilty of contributory negligence" (302).

This case it seems to us comes squarely within the holding of this court in the case of *Great Northern Railway Company vs. Wiles*, 240 U. S. 444, 36 Sup. Ct. Rep. 406, where a failure on the part of a rear brakeman to comply with a similar flagging rule was involved. In that case, the deceased, a rear brakeman, neglected to flag the rear of his train when same had been stopped for a period of about five minutes on account of the pulling out of a drawbar, and as a consequence, a following train crashed into his caboose, killing himself and his conductor. This court in an opinion by Mr. Justice McKenna in said case said:

"There is no justification for a comparison of negligence or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles, a duty not only to himself, but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles knew them, and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads, and what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and an anxious sense of responsibility.

In the present case there was nothing to extenuate Wiles' negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was

easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed."

2. *The failure of the evidence to establish that the acts complained of in the petition constituted actionable negligence, under the Federal Employers' Liability Act, toward Cradit.*

These questions will be discussed in the order same appear in the petition, and under the same sub-headings as the acts of negligence are designated in the statement of facts, *supra*.

(a) That the dispatcher who was dispatching trains over the district between Cheyenne, Wyoming, and Sidney, Nebraska, knowing that the weather conditions made it unsafe to operate trains closer together than the distance of one telegraph station to another, negligently ordered Cradit's train to proceed east from Dix to Sidney, and Extra 501 East to follow Cradit's train to Sidney and in close proximity thereto.

The company's negligence in this particular depends entirely upon whether or not the dispatcher under all the circumstances was negligent.

If plaintiff in error had promulgated and was enforcing rules at that time, which, when observed by trainmen, provided for the safe operation of trains in any kind of weather (245, 246, 250,

267), the dispatcher Borton could not have known that the weather conditions made it unsafe to operate trains in the manner charged above, unless he had actual or constructive notice that the trainmen were not observing these rules.

To prove this act of negligence defendant in error simply offered evidence tending to show that the storm was of such severity on the night of the wreck that it was difficult to see the ordinary block signals along the route the said trains were required to travel, or a red lantern or burning fusee at any considerable distance along said route.

The uncontradicted evidence shows that there was installed and perfectly operating on the night of the wreck a block signal system which, in connection with the rules applicable thereto, was sufficient in and of itself to effect the safe operation of trains in any kind of weather. The uncontradicted evidence further shows that at said time there was in force and effect certain rules governing the operation and protection of trains, which, if observed, were sufficient in and of themselves to effect the safe operation of trains in any kind of weather without the aid of the block signal system. These latter rules particularly dealt with the duties of flagmen or rear brakemen, when their train was stopped or delayed while enroute, requiring the use of torpedoes, fusees and lanterns to warn a train of its proximity to another train. As an added precaution the dispatcher was spacing the trains on his district that

night, and held Extra 501 East at Potter until Extra 504 East arrived at Mile Post 426 (228, 229). Borton, the dispatcher, took the extra precaution of spacing the trains on his district that night. As said by the trial court in instruction Number 16, he had a right to assume that the trainmen operating the trains in question would observe the rules promulgated by the company; and the company having promulgated rules, which were sufficient to protect the operation of trains under any and all circumstances and in any kind of weather, Borton's act in ordering the two trains to proceed on to Sidney could not under any circumstances constitute negligence in the absence of evidence that he was aware of the fact that the crews in question were violating these rules. There is no such evidence in the record, neither is there evidence in the record which in any way tended to prove that fact, nor that Borton had, either actual or constructive knowledge, that the storm was interfering with the observance of block or other signals to the extent that it was impairing the safe operation of trains. The evidence of the defendant in error, therefore, was insufficient to prove this act of Borton to be negligent. The State Supreme Court in its opinion, said:

"It cannot be said that defendant was guilty of actionable negligence for a mere failure to tie up its trains." (300).

Assuming, however, for the sake of argument that Borton was negligent in ordering the trains

in question to proceed eastward from Dix, defendant in error can not predicate a cause of action upon that act of negligence, because the danger of operating said trains in the vicinity in which they were at the time the orders were issued was better known to Cradit, on account of his presence at that particular point, than to Borton, who was located at Sidney. The evidence shows that Cradit was aware at Dix, if not before arrival there, of the fact that Extra 501 East was closely following his train over the district between Cheyenne and Sidney. If there was any danger of operating these trains that night, it was at least as apparent and obvious to Cradit, the experienced brakeman, as it was to the dispatcher. He made no protest or complaint against proceeding onward with his own train from Dix, nor against Extra 501 following his train. He, therefore, must be held to have assumed the risk of the dangers arising from this alleged negligent act of Borton, and the Federal Employers' Liability Act, under the circumstances, does not permit him to recover upon this act of negligence. The question of assumption of risk will be more fully discussed under another sub-division of this brief.

(b) That the Assistant Superintendent of the railroad company at Sidney, knowing that the weather conditions, then existing, made it unsafe to operate trains between Sidney and Cheyenne, negligently ordered a freight train known as Extra 510 West to proceed westward from Sidney to Cheyenne at 1:10 o'clock A. M.

The evidence shows a severe snow storm prevailing at Sidney at the time this train was ordered west, but there is no evidence in the record to show that Assistant Superintendent Sage had either actual or constructive knowledge that the signals necessary to be observed for the safe operation of trains, could not be seen on the night in question; and if such signals could not be seen, that the trainmen would disregard the rules of the company and continue to operate their trains notwithstanding their inability to observe the signals controlling the movement thereof. Consequently this act cannot be held to be negligence.

But this act of Mr. Sage can not sustain a verdict in this case for another reason. Under no circumstances can it be claimed that the ordering of Extra 510 West to proceed westward on the night in question was the proximate cause of Cradit's death. The act complained of must not only constitute negligence, but such negligence must be the proximate cause of his death in order to permit a recovery under the Federal act.

Roberts Injuries to Interstate Employees,
Sec. 13;

St. L. I. M. & S. Ry. Co. vs. McWhirter,
229 U. S. 265, 57 L. Ed. 1179;

Seaboard A. L. Ry. Co. vs. Moore, 228
U. S. 433, 57 L. Ed. 907.

If the wreck in question could not have been foreseen, or reasonably anticipated as the natural and probable consequence of the act of Sage in

ordering Extra 510 West to proceed westward then no action can be maintained under the Federal act for the injuries resulting therefrom.

Gt. No. Ry. Co. vs. Johnson, 207 Fed.
521 (8th C. C. A.);

Armour vs. Harcrow, 217 Fed. 224 (8th
C. C. A.).

It is true that if Extra 510 West had not been ordered westward on the night in question, its engine would not have run out of water at Mile Post 426, and if its engine had not run out of water at Mile Post 426, Cradit's train would not have been stopped at Mile Post 426 for the purpose of picking up engine 510, and if Cradit's train had not been stopped at Mile Post 426 for that purpose, Extra 501 East would not have run into Cradit's train. But such deductions do not make the act the proximate cause. To constitute the collision the natural consequence of Sage's act, it must be the consequence which would have ordinarily followed it—the result which might reasonably have been anticipated from it; and in order to make the wreck the probable consequence of Sage's act it must be the consequence that was more likely to follow from his act than not to follow therefrom.

Armour vs. Harcrow, 217 Fed. 224 (8th
C. C. A.)

The direct and immediate cause of the wreck was the failure of Cradit to protect his train as

required by Rule 99, or, at most, of Cameron to govern the operation of his train by the block signals. These derelictions were not more likely to follow Sage's act than not, neither were they within the realm of reasonable anticipation.

Plaintiff, therefore, having failed to show by a preponderance of the evidence that Sage's act was the proximate cause of Cradit's death, no recovery can be based thereon.

(c) That the dispatcher aforesaid, with knowledge of the weather conditions described, above, and of the inability of trainmen to see signals, negligently ordered Cradit's train to stop at Mile Post 426 and pick up engine 510 of Extra 510 West for the purpose of taking it to Sidney.

This act of negligence is subject to the same exceptions noted under the first and second acts of negligence. The company having promulgated rules which were sufficient to protect the trains in question in any kind of weather, and having a right to presume that such rules would be obeyed, its action, through its dispatcher at Sidney, in ordering Cradit's train to pick up engine 510 could not be held to be negligent, neither can it be said to have been the proximate cause of the collision. Furthermore, if it could be said that the dispatcher was negligent in ordering trains to operate at all on the night in question, because of the severity of the storm, Cradit in continuing to carry out such orders with the same, if not better, knowledge of the weather conditions than

was possessed by the dispatcher, must be held to have assumed the risk arising therefrom.

(d) That, at the time of the collision, Cradit's train and Extra 501 East and Extra 510 West were running without headlights.

There was no evidence that this fact in any way contributed to the cause of the wreck, and this allegation as a charge of negligence was withdrawn from consideration of the jury by the trial court in instruction number fourteen.

(e) That Extra 501 East negligently left Potter, Nebraska, a station west of Mile Post 426, without its conductor, whose duty it was to observe the block signals, thereby depriving said train of the care and management of its conductor.

The evidence shows that the conductor's position upon the train was in the caboose; that the block signals indicate danger immediately upon being passed by the engine—consequently, these signals would always be at danger when passed by the conductor, and that the operation of the train, so far as the block signals are concerned, does not depend upon his observance of them. There was no evidence offered tending to show that his presence on his train would have averted the collision (279). This being true, the presence or absence of the conductor from the train had nothing to do with the wreck.

(f) That, while Extra 501 East was proceeding eastward without a conductor and without

a headlight, it negligently failed to observe the signals immediately to the rear of Cradit's train and ran into and demolished the caboose of said train.

As before stated, the absence of the conductor from Extra 501 and the failure of a headlight in the engine did not constitute actionable negligence. The evidence was uncontradicted that the only signals to the rear of Cradit's train, which might have prevented the wreck, were the automatic block signals, because the evidence was clear that Cradit failed to comply with Rule 99 which required him to signal the following train by torpedoes, fusees or a red lantern. The evidence showed that engineer Cameron of Extra 501 East ran by the block signals to the rear of Cradit's train on the night in question. This act of Cameron would constitute actionable negligence, unless Cradit by his conduct had waived his right to predicate a cause of action thereon, or was aware of the fact that Cameron was not depending upon the block signals for the safe operation of his train and was willing to proceed in the face of that danger, thereby assuming the risk. We contend, under the circumstances, that this conduct on the part of Cameron did not constitute actionable negligence for both of the reasons set forth above. Both Cameron and Long, the engineer and fireman, respectively, upon Extra 501 East, testified that while their train and Cradit's train were at Dix, Cradit and Phillips came into the caboose of their engine and that Cameron discussed with Phillips, in the presence of Cradit,

the difficulty he was having in observing the block signals on account of the storm, and gave them to understand that he would have to depend upon them doing "a good job of flagging" (to use his language) in the event their train should be stopped or delayed for any reason between Dix and Sidney. Phillips in the presence of Cradit promised Cameron that they would, and Cameron testified that he relied upon that promise, and in proceeding eastward from Dix was depending, for the security of his train, upon the flagging that Phillips and Cradit had promised to do, rather than upon the block signals. Cradit knew as a result of that conversation that Cameron, in following his train, did not intend to depend upon the block signals for the safe operation of his train, but would depend upon the protection which Cradit and Phillips promised to give.

In view of this private arrangement between Cameron, Phillips and Cradit, Cameron on longer owed to Cradit the duty to operate his train by the block signal system, as Cradit by his conduct and this agreement had waived the necessity of the performance of that duty toward him. Cameron therefore could only be negligent toward Cradit in the event that he should violate the private agreement or arrangement made, by running past fusees, torpedoes, or a red lantern, used by Cradit or Phillips for the protection of their train. No torpedoes, fusees, or red lanterns having been passed by Cameron, or attempted to be placed on the track in the rear of Cradit's train when it stopped at Mile Post 426, the in-

jury to Cradit, therefore, was due solely and exclusively to his own misconduct in failing to carry out the obligation imposed upon him by the arrangement between himself, Phillips and Cameron. These parties had seen fit to substitute this method of operating their trains for the safer method which had been adopted and promulgated by the company. Cradit had agreed to, or acquiesced in, the substitution of an unsafe way of performing his work for the safe way provided by his employer and must be held to have assumed the risks, dangers and hazards arising from this new method. The wreck having occurred by reason of his failure to carry out his part of the new method, it must be held that his act was the sole cause of his injury and as a consequence there can be no recovery under the Federal act.

Grand T. W. Ry. Co. vs. Lindsay, 233
U. S. 42, 58 L. Ed. 838;

Ellis vs. L. H. & St. L. R. Co., 155 Ky.
745;

Pankey vs. A. T. & S. F. Ry. Co., 180
Mo. App. 185.

It is true that the jury, in its anxiety to return a verdict in favor of the defendant in error, regardless of the evidence, found in its third special finding that the conversation, referred to above, between Cameron, Phillips and Cradit did not take place. This conversation was testified to by competent, uncontradicted and unimpeached witnesses, and the Nebraska Supreme

Court has said that a contrary finding under such circumstances will not be permitted to stand.

White vs. C. B. & Q. R. Co., 93 Nebr.
736, 141 N. W. 1038.

II.

The Supreme Court of Nebraska Erred in Approving the Action of the Trial Court in Holding that the Evidence in the Record was Sufficient to Establish Liability under the Federal Employers' Liability Act on Each of the Five Acts of Negligence Submitted to the Jury, and in Submitting Each of said Charges of Negligence to the Jury with Instructions that a Verdict could be Based upon Anyone thereof.

This question is presented in errors 4, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24 and 25 of the assignment of errors filed in the State Supreme Court. (Record pp. 310 to 318, inclusive.)

The charges of negligence contained in the petition in the trial court are set forth under subdivision "I" of this brief, and the sufficiency of the evidence to establish each act of negligence is there discussed.

The trial court submitted each of said acts of negligence to the jury with instructions that a verdict could be based upon anyone thereof.

(See Instructions Nos. 1 and 5, Record pp. 12 and 15, respectively.)

The trial court refused instructions requested by the plaintiff in error separately asking a withdrawal from consideration of the jury of each of said acts of alleged negligence. (See requested instructions 2 to 12, inclusive, Record pp. 22 to 24.)

If, therefore, the evidence was not sufficient to constitute any one of said acts complained of, actionable negligence under the Federal Employers' Liability Act, then this case should be reversed, because the trial court must then be held to have permitted the jury to base a verdict upon facts and charges which do not permit a recovery under the Federal Employers' Liability Act.

The rule of the Federal decisions, as stated in the syllabi of *Wilmington Star Mining Company vs. Fulton*, 205 U. S. 60, is as follows:

"Where there is no evidence sustaining certain counts in the declaration as to defendant's negligence, he is entitled to an instruction that no recovery can be had under those counts, and where, as it was in this case, the refusal to so instruct is prejudicial error the verdict cannot be maintained, either at law or under Section 57 of the Illinois Practice Act."

While we claim the court erred in submitting each of the alleged acts of negligence to the jury, the error was particularly flagrant in submitting acts designated as (a), (b) and (e) herein.

The State Supreme Court in its opinion specifically held that the act of negligence designated as (a), wherein plaintiff in error was charged with negligence in operating the three trains, involved in the accident, on the night of the collision, did not constitute actionable negligence. It said:

"The wind was blowing at the rate of 30 miles an hour or more; snow was falling, or blowing; there was difficulty in observing the block signals, if, in fact, they could be observed at all, and the dispatcher and assistant superintendent knew that it was an unusual storm. But the passenger and mail trains went over the line during the night; none of the trainmen had reported that it was impossible to see the block signals, or that the headlights were not burning. It cannot be said that defendant was guilty of actionable negligence for a mere failure to tie up its trains. * * * *"

Yet it affirmed the action of the trial court in submitting this issue to the jury.

Charges (b) and (e) dealt with the action of the Assistant Superintendent at Sidney in ordering Extra 510 West to proceed westward from Sidney,

and of operating Extra 501 East from Potter, Nebraska, without its conductor, respectively; neither of which acts we contend can be claimed to have been the proximate cause of the accident, or a concurring proximate cause of the accident.

In referring to the alleged negligence on the part of the Assistant Superintendent aforesaid, the State Supreme Court in its opinion said:

“Appellant denies that any negligence on the part of the Assistant Superintendent was shown, or that the acts charged constitute actionable negligence, and that the court erred in refusing its requested instructions withdrawing from the jury consideration of the acts of negligence charged against him.”

* * * *

“Of course, this act alone did not cause the accident but it formed one link in a chain of incidents culminating in the wreck.” (Record pp. 301 and 302.)

Notwithstanding this holding, it approved the action of the trial court in telling the jury that a verdict could be based solely upon this alleged act of negligence.

III.

The Supreme Court of Nebraska Erred in Approving the Action of the Trial Court in Instructing the Jury that Under the Law Governing said Case, a Servant or Employee

does not Assume any risks or Dangers Arising from Negligence of the Master or Employer, thereby Denying to Plaintiff in Error the Defense of Assumption of Extraordinary Risks Available to it under the Federal Act.

This question is presented in Errors 5, 8, and 21 of the assignment of errors filed in the State Supreme Court.

In Instruction Number 6, the trial court attempted to cover the whole law of the case with reference to the liability under the Federal Employers' Liability Act, and omitted to state therein that the defense of assumption of risk was available to plaintiff in error under said act. (Page 16 Record.)

In Instruction Number 16, Page 20, Record, the trial court instructed the jury as follows:

"As one of its defenses the Defendant pleads what is known and called assumption of risk. You are instructed as a matter of law that a servant or employee assumes the ordinary risks and dangers incident and peculiar to the employment upon which he enters but he does not assume any risk or dangers, due to the master's or employer's negligence, nor does he assume risks or dangers arising from sudden unforeseen circumstances, not ordinarily incident to his employment.

* * * *

"It is for you, Gentlemen of the Jury, to determine from all the evidence in this

case, from all the facts and circumstances shown on the trial, whether or not the injury and death of the deceased, Charles M. Cradit, was because of the risks and hazards incident and peculiar to the employment in which he was engaged. If, from all the evidence, you find that the injury and death of the said Charles M. Cradit was due to and the result of the risks and hazards incident and peculiar to the business of brakeman in the operation and running of trains, then Plaintiff cannot recover herein; and if you so find, you will return a verdict finding for the Defendant."

When this case was tried, this court had not passed upon the question as to whether or not the rule of assumption of extraordinary risks, as then applied by the Federal Courts, was still available as one of the defenses to actions prosecuted under the Federal Employers' Liability Act.

The trial court decided that such defense was not available under said act, and so instructed the jury. When this case reached the State Supreme Court, that question had been settled by the decisions of this court:

Seaboard Air Line Ry. Co. vs. Horton,
233 U. S. 492.

Southern R. Co. vs. Crockett, 234 U. S.
725.

But to affirm the judgment of the trial court, the State Supreme Court was compelled to hold that the evidence in the record was not sufficient

to present that issue. This holding of the State Supreme Court was clearly erroneous, because the issue was not only presented by the allegations in the petition of defendant in error, but also in the evidence of both defendant in error and plaintiff in error.

The main ground for recovery in this case was that plaintiff in error was negligent in continuing to operate its trains during the storm prevailing at the time of the wreck. Cradit being one of the trainmen engaged in operating a train that night was certainly aware of the dangers likely to arise in the operation of trains during a storm of that character. He knew what trains were being operated that night, and the weather conditions out along the line better than the dispatcher at Sidney, upon whose negligence the action was in part predicated. Cradit's train was at Dix for more than an hour when the storm was at its height and as bad as it was at the time of the wreck. His train also stopped at Potter, but he made no complaint at either place about continuing to assist in the operation of his train into Sidney. By continuing in his work in the face of this known danger, whether same arose from the negligence of the defendant or not, certainly presented the question of assumption of risk of the dangers arising therefrom.

It was likewise available as a defense to the alleged negligence of the Assistant Superintendent at Sidney in ordering Extra 510 West to proceed westward from Sidney, because the evidence shows

that Cradit by the train orders issued to his train had been advised of this action on the part of the Assistant Superintendent long before the accident and before his train had left Dix and Potter. So also was it available as a defense to alleged negligent act (f), because of the evidence in the record of the knowledge of Cradit that Extra 501 East was proceeding eastward following his train, notwithstanding the fact the engineer was having difficulty in observing the block signals.

By instructing the jury that Cradit did not assume any risks or dangers due to his employers negligence, and by refusing requested instruction Number 21 (Pages 25 and 26 Record), plaintiff in error was, thereby, denied a right, privilege and immunity granted to it under the Federal Employers' Liability Act.

Seaboard Air Line Ry. Co. vs. Horton,
233 U. S. 492;

Southern R. Co. vs. Crockett, 234 U. S.
725.

The refusal of the Supreme Court of Nebraska to give to your petitioner the benefit of this defense, presented a Federal question for review by this court.

C. & O. R. Co. vs. DeAtley, 241 U. S.
310;

Southern Railway Co. vs. Crockett, *supra*.

IV.

The Supreme Court of Nebraska Erred in Holding that there was no Evidence in the Record Sufficient to Raise the Issue of Assumption of Risk of any of the Acts of Negligence Charged in the Petition.

This question is discussed and presented under the foregoing sub-division.

V and VI.

The Supreme Court of Nebraska Erred in Approving the Action of the Trial Court in Determining and Fixing the Amount that the Gross Damages should be Reduced on Account of the Contributory Negligence of the Deceased, after the Jury had Expressly Refused to make any such Reduction, although Instructed to do so by the Court.

The Supreme Court of Nebraska erred in holding that in an action under the Federal Employers' Liability Act, where the Court had instructed the Jury that Contributory Negligence on the part of the employee has been shown, but the jury makes no deduction in the amount of the verdict because of such negligence, the court may order such remittitur as seems proper under the evidence, and in doing so, instead of remanding said case to the trial court for a proper reduction therefor by a jury.

We challenge the right of the trial and State Supreme Courts to determine the amount the total damages should be diminished on account of the contributory negligence of deceased, for the reason that the Federal Employers' Liability Act expressly requires that this deduction be made "*by the jury.*"

Section 3 of the Federal Employers' Liability Act, provides in part as follows:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

It will be seen from an examination of the above quotation that the law expressly requires that the deduction of the damages for contributory negligence shall be made "*by the jury.*" In cases tried under this act in the Federal Courts, such deduction would have to be made by the jury—otherwise, the 7th Amendment to the Constitution of the United States, which guarantees the right of trial by jury in controversies involving more than \$20.00, would be violated.

Kennon vs. Gilmer, 131 U. S. 22;
Baylis vs. Travellers Ins. Co., 113 U. S.
316;
Hodges vs. Easton, 106 U. S. 408.

Consequently, if all cases arising under this act were to be tried in the Federal Courts, the adding of the clause that "the damages shall be diminished by the jury" would have been useless verbiage in the law.

But the state courts have concurrent jurisdiction of this class of cases with the Federal Courts, and, as it has been held that the provisions of the 7th Amendment to the Federal Constitution referred to above, only apply to trials in the Federal Courts, it was necessary, in order to give to litigants in the state courts the guarantee of a trial of this issue by a jury, to specifically recite that requirement in the law, because all states do not have a constitutional provision of the same force and effect as the 7th amendment to the Federal Constitution. This situation is what undoubtedly prompted Congress to insert this clause in the law; or Congress may have realized that in comparing the negligence of employees with the negligence of employers, and in fixing the amount that should be deducted from the whole damages, because of the contributory negligence of the employee, questions would be presented that were within the peculiar province of a jury to determine as many facts and circumstances, extenuating and otherwise, would

necessarily be involved which must be carefully weighed, sifted and considered.

In the case of *N. Y. C. & St. L. R. Co. vs. Niebel* 214 Fed. 952, 957, it is said:

“Under the rule of comparative negligence, the jury is entitled to consider all the circumstances which characterize the negligence of either party and which tend to fix the quantity and quality of that negligence in its relation to the sum total of the negligence of both parties. Even though the negligence of either party clearly appears, all circumstances of aggravation or of mitigation must be considered.”

This, under our system of jurisprudence, is a matter clearly within the province of the jury.

In the late work of Thornton on Federal Employers' Liability Act, Third Edition, Sec. 112, in referring to the manner in which the damages should be apportioned under this section of the Federal Employers' Liability Act, it is said:

“It is clear that courts cannot lay down rigid rules for the apportionment of the damages in a particular case. This is a fact that must be left to the jury, practically without directions. The remarks of Justice Cooley upon negligence in general throw some light upon the subject: ‘Negligence, as I understand it,’ says he, ‘consists in a want of that

reasonable care which would be exercised by a person of ordinary prudence, under all the existing circumstances, in view of the probable danger of injury. The danger is, therefore, one which must take into consideration all these circumstances, and it must measure the prudence of the parties' conduct by a standard of behavior likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other person, and he is not to be considered blamable if the injury has resulted from the action of another which he could not reasonably have anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons; it is only to be satisfactorily solved by the jury placing themselves in the position of the injured person and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury.' "

In the case of *Norfolk Southern R. R. vs. Ferebee*, 238 U. S. 269, the jury at the first trial

returned a special verdict finding that the railroad company was negligent and that plaintiff was not guilty of contributory negligence. The appellate court on account of errors in the charge relating exclusively to the subject of damages, granted a partial new trial limited to the amount of damages, and on which the court refused to admit evidence as to plaintiff's contributory negligence. On error proceedings to the Supreme Court of the United States, the railroad challenged the action of the court in refusing to admit evidence as to plaintiff's contributory negligence. Mr. Justice Lamar in referring to this practice on the part of the state court said:

"But a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice. Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury."

In the case of Seaboard Air Line Co. vs. Tilghman, 237 U. S. 499, the only error found in the record was that the trial court had improperly instructed the jury on the proportion of damages that should be deducted for contributory negligence, yet this court did not attempt to fix the

amount of the gross damages and the deduction to be made for contributory negligence, as was done by the State Supreme Court in this case, but remanded the case to the state court for further proceedings.

The doctrine of remittitur is as much a part of the practice of the Federal Courts as it is of the State Courts, but the Federal Courts have only felt justified in ordering a remittitur in those cases where the evidence was such that the court could clearly distinguish and separate the damages justly awarded from the damages improperly awarded.

In the case of *Hansen vs. Boyd*, 161 U. S. 397, 411, it is said:

"The rule has been adopted by this court that it is proper, either for the trial court upon an application for a new trial, or for an appellate court in reviewing a judgment, to permit the party, in whose favor a verdict or judgment has been returned or entered, to avoid the granting of a new trial on account of error affecting only a part thereof, by entering a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same. *Koenigsberger vs. Richmond Silver Mining Co.*, 158 U. S. 41, and cases cited p. 53, *Phillips & Colby Construction Co. vs. Seymour*, 91 U. S. 646, 656."

In the case of *N. Y. C. & St. L. R. Co. vs. Niebel*, 214 Fed. 952, 957, 958, it is said:

"We have seriously considered whether this error, although prejudicial, might be cured by permitting the plaintiff to remit a portion of the damages and thereupon affirming the judgment. We recognize the desirability of the shortening of litigation and lessening of expense which such a remittitur may accomplish. However, in the instance, in which this practice has been followed by the Supreme Court (see *Hansen vs. Boyd*, 161 U. S. 397, 411, 16 Sup. Ct. 571, 40 L. Ed. 746) and by this court (*C. J. Huebel Co. vs. Leaper*, 188 Fed. 769, 110 C. C. A. 475; *Mosby vs. Printy*, 194 Fed. 346, 116 C. C. A. 74), there has been mathematical basis by which it could be computed, or at least closely approximated, how much of the verdict was due to the erroneous element; and we have declined to permit such a remittitur in a case where this computation could not be made (*Chesbrough vs. Woodworth*, 195 Fed. 875, 887, 116 C. C. A. 465); and we are not aware of any instance where this practice has been adopted by a federal appellate court, and in which the elements of damage were of such indeterminate character that there was no criterion for segregation. In view of the manifest merit of the practice, we are not prepared to hold that it may never be adopted in any case where the verdict is based on these indeterminate elements; it may sometimes clearly enough appear from the whole record that the damage resting on the erroneous foundation cannot be more

than a certain amount and that there can be no injustice in providing that the verdict may stand if the plaintiff will remit that amount. However this might be, we think the present case is not one of those where such remittitur can be permitted. We would be compelled to estimate three fractions. First, what portion of the whole damages was represented by the verdict after a proportionate deduction on account of contributory negligence; second, what portion of the verdict was considered as damages to the widow; and third, what portion of these damages to the widow was for the loss of society as distinguished from loss of support. The problem would be one degree less difficult for us to solve if, as directed in *Railway vs. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, damages had been apportioned among beneficiaries. As the record stands, to sanction a reduction in the judgment now and so to cure the error in the charge would require us either to find an unknown fraction of an unknown portion of an unknown whole, or else to allow so liberally for these uncertainties as to put upon the plaintiff a greater and more unjust burden than is imposed by the award of a new trial."

The difficulty of a court grappling with this question, was even recognized by the State Supreme Court in its opinion in this case, wherein it is said:

"In the instant case negligence may be traced to so many different people that it is difficult to determine the proportion that ought to be charged to the deceased."

In support of its right to fix the amount of damages that should be deducted on account of the contributory negligence of deceased, the opinion cites the case of Yazoo & M. V. R. Co. vs. Wright, 207 Fed. 281, and Pennsylvania Co. vs. Sheeley, 221 Fed. 901.

In the first case cited, a verdict was returned for \$19,000.00; on hearing of the motion for a new trial it was reduced to \$10,000.00, but it does not appear from the opinion that the action of the trial court in this behalf was challenged by the defendant in the appellate court. The defendant was challenging the judgment of the trial court in this case principally on the ground that the plaintiff had failed to show any actionable negligence, and that if plaintiff had, that the deceased had assumed the risks thereof. The defendant evidently was satisfied with a judgment of that size, in the event that the court should find there was a liability. The question of the right of the trial court to order a remittitur in that case was not discussed in the opinion. Certainly such a case cannot be put forth as an authority of the Circuit Court of Appeals on this proposition.

In the second case cited, the appellate court, it is true, did make a deduction to cover the contributory negligence of the employee. But the

right of that court to exercise that function does not seem to have been questioned or even discussed in the case. It is an authority for the proposition that some Circuit Court of Appeals did exercise that function, but it is an extremely weak authority on the proposition that the court had a right to exercise that function.

If the trial court and State Supreme Court can fix the amount that the gross damages shall be reduced on account of the contributory negligence of the deceased where the jury contrary to instructions has failed to fix any amount, does it not logically follow that said courts would have the power to fix the gross damages, also, in a case where the jury had found the employer liable, but had refused to fix or award any damages?

The judgment as finally entered by the State Supreme Court was purely "judge made" as that court neither approved the amount of gross damages found by the jury and the trial court, nor the amount to be deducted therefrom on account of contributory negligence as fixed by the trial court after the jury had refused to determine said sum.

VII.

The Supreme Court of Nebraska Erred in Holding that to Permit a Recovery under the Federal Employers' Liability Act, Defendant in Error need not Establish that the Acts of Plaintiff in Error, of which Complaint is Made, were Causal, or one of the Concurrent

Proximate Causes of the Injury, but need only Establish that such Acts Contributed Thereto.

In the opinion of the State Supreme Court it attempts to justify the action of the trial court in submitting to the jury the alleged act of negligence based upon the action of the Assistant Superintendent at Sidney in ordering Extra 510 West to proceed westward from Sidney to Cheyenne on the night of the collision, by holding that it was not necessary in sustaining a recovery under the Federal Act upon such act of negligence to show that same was causal, or in other words one of the concurring proximate causes of the injury, but that it need only be shown that such act contributed to the injury.

In referring to this alleged act of negligence in the opinion, the court said:

“Of course, this act alone did not cause the accident, but it formed one link in a chain of incidents culminating in the wreck.”

In sustaining a right of recovery upon another act, which was clearly not proximate, it quoted and followed the following erroneous rule from the case of *Sandridge vs. A. T. & S. F. R. Co.*, 193 Federal 869, 875:

“Furthermore, the negligence of the train dispatcher need not have been the sole and only cause of the accident to charge the de-

fendant with negligence, if his negligence contributed to the accident—that is to say, if his action had a share in bringing about the disaster—the defendant will be liable.” (Record p. 301.)

The same interpretation was placed upon the Federal Act by the trial court in its Instruction No. 15. (Record pp. 19 and 20.)

The State Supreme Court was forced to this construction of the Federal Act in order to sustain the submission to the jury of certain of the acts of negligence charged, which were not shown to be the proximate cause of the accident.

That the negligent act must be causal to permit a recovery under the Federal Act is fully established by the decisions of this court:

St. L. I. M. & S. Ry. Co. vs. McWhirter,
229 U. S. 265;

Seaboard A. L. Ry. Co. vs. Moore, 228
U. S. 433;

Norfolk & Western Ry. vs. Earnest, 229
U. S. 114;

St. L. & S. F. R. R. vs. Conarty, 238
U. S. 243.

VIII.

The Supreme Court of Nebraska Erred in Approving the Instruction of the Trial Court to the Effect that the Widow and Minor

Children of the Deceased would be Permitted to Recover such Damages as they "May have Suffered" on Account of the Death of the Deceased, instead of such Damages as They "Did" Suffer.

In Instruction No. 10 the trial court on its own motion charge the jury in part as follows:

"If, under the evidence and these instructions, you find for the plaintiff, then I charge you that the measure of the damages, the amount plaintiff is entitled to recover, is such sum as will compensate the widow and minor children of the deceased Charles M. Cradit, in whose behalf the plaintiff sues, for the pecuniary loss, if any, that they may have suffered by reason of the death of said Charles M. Cradit, less such sum, if any, you find such damages should be diminished by reason of contributory negligence on the part of the said Charles M. Cradit."

By this instruction the trial court permitted the jury to award the plaintiff damages for such pecuniary loss as the beneficiaries "may" suffer in the future. This instruction opened the door for unrestrained speculation on the part of the jury, and violated the principle of law that future damages are governed by the "rule of reasonable certainty."

The measure of liability for future damages has been clearly set forth in the case of Chicago

& N. W. Ry. Co. vs. De Clow, 124 Federal 142 as follows:

"The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such suffering and other evil effects of the act as are reasonably certain to result from it. Possible, even probable, future damages are too remote and speculative to form the basis of legal injury. If they may or subsequently do result from the accident they are but a part of that *damnum absque injuria* which reaches too far into the realm of conjecture to form any part of the basis of an action at law. Filer vs. N. Y. Central R. R. Co., 49 N. Y. 42, 45; Curtis vs. R. & S. R. R. Co., 18 N. Y. 534, 542, 75 Am. Dec. 258; Fry vs. Railway Co., 45 Iowa 416, 417; White vs. Milwaukee City Ry. Co., 61 Wis. 536, 541, 21 N. W. 524, 50 Am. Rep. 154; Block vs. Milwaukee St. R. Co., 89 Wis. 371, 380, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; Smith vs. Milwaukee Builders & Traders Exchange, 91 Wis. 360, 368, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912; Ford vs. City of Des Moines, 106 Iowa 94, 97, 75 N. W. 630; Chicago R. I. & Pac. R. Co. vs. McDowell (Neb.) 92 N. W. 121."

The rule announced in the above opinion was approved in C. M. & St. P. Ry. Co. vs. Lindeman, 143 Federal 946 (8th C. C. A.), and the holding in the latter case on this subject was approved by this

court in the case of South Western Brewery & Ice Company vs. Schmidt, 226 U. S. 162.

See also Nixon vs. O. & C. B. St. Ry. Co.,
79 Nebraska 550.

C. R. I. & P. vs. McDowell, 66 Nebraska
170.

For the reasons hereinbefore set forth, we contend that the judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted,

N. H. LOOMIS,

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Attorneys for Appellant.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. **174**

**UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,**

vs.

**CHARLES M. HADLEY, AS ADMINISTRATOR OF
THE ESTATE OF CHARLES M. CRADIT,
DECEASED, DEFENDANT IN
ERROR.**

IN ERROR TO THE SUPREME COURT OF NEBRASKA

REPLY BRIEF OF PLAINTIFF IN ERROR.

**N. H. LOOMIS,
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*Attorneys for
Plaintiff in Error.*

(25,316)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 495

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

CHARLES M. HADLEY, AS ADMINISTRATOR OF
THE ESTATE OF CHARLES M. CRADIT,
DECEASED, DEFENDANT IN
ERROR.

IN ERROR TO THE SUPREME COURT OF NEBRASKA

REPLY BRIEF OF PLAINTIFF IN ERROR.

Many of the matters discussed by defendant in error in the answer brief filed herein are so fully presented in our first brief that a further discussion here would be only repetition.

But for fear that some of the discussion in the brief of defendant in error, upon the points

raised by plaintiff in error, might be misleading, we have deemed it advisable to present this reply brief.

We will maintain the same classification, numerically and otherwise, in this brief as was presented in our first brief, setting forth only such subjects as will be discussed in this brief.

I.

The Supreme Court of Nebraska erred in holding that there is evidence in the case sufficient to establish a liability under the Federal Employers' Liability Act upon the acts of negligence charged.

1 The neglect of Cradit in failing to flag the rear of his train under the circumstances was such that there is no justification for a comparison of evidence of negligences or the apportioning of their effect.

In support of this contention we relied in our original brief on the case of *Great Northern Railway Company vs. Wiles*, 240 U. S., 444, 36 Sup. Ct. Rep. 406. It is claimed that the case at bar is distinguishable from this case in three particulars, viz.:

(a) The observance of the flagging rule would not have prevented the accident.

(b) The failure to flag was justified by the severe weather conditions.

(c) The Railroad Company was guilty of no negligence in the Wiles case.

We will take up these alleged distinguishing features in the order named.

(a)

Would the flagging required by the rules of the Company have prevented the accident?

There is no evidence in the record that the engine crew of Extra No. 504 East would or could not have seen a burning fusee, or the reflection thereof, or heard the explosion of a torpedo placed on the track. On the contrary, the record is undisputed that such signals would and could have been observed, and would have been sufficient to have stopped Extra No. 504 East, even though such signals had been given only a short distance from the caboose of Extra No. 501 East, because Extra No. 504 East was moving at a slow rate of speed, five or six miles per hour, and could have been stopped in a very short distance.

(b)

Was the failure to flag justified by the severe weather conditions?

Debate upon this question would seem to be foreclosed by the holding and express instruction of the trial court to the jury that such failure

constituted contributory negligence in this case as a matter of law and an express affirmance of that holding and instruction by the State Supreme Court in its opinion in this case.

Furthermore, it would seem that whatever the weather conditions were, Cradit knew them as well as anyone, having had plenty of opportunity to observe such conditions at the stops made at Dix and Potter, where the weather conditions were as bad as at the time and place of the collision. He made no complaint to anyone about proceeding with his train, in the face of these conditions, but willingly undertook the responsibilities of his employment to his employer and the passengers in his charge in connection with the operation and protection of his train. Neither he nor his representatives should be permitted to justify his neglect of these responsibilities, especially in view of the fact that his act (paraphrasing the language in the Wiles case) "brought death to himself and to the conductor of his train" and "extended the catastrophe to the destruction of passengers," and "cast immeasurable liability" upon the railroad for the deaths and injuries of passengers, and the loss of property and freight destroyed.

The weather conditions, however, were not so severe as to prevent or seriously hinder the performance of the flagging duty. The temperature was not low—only a little below freezing. The tracks at the point of collision, and to the westward for a considerable distance, were ele-

vated, and the wind had kept them clean of snow throughout the entire night. The reflection of a burning fusee in his hand or on the track could have been seen for a considerable distance by the engine crew of the following train, if the actual flame could not. A burning fusee reflected sufficient light to permit the cleaning out of switches during the night, consequently it would have afforded sufficient light for him to find his way for a sufficient distance to the rear of his train for its protection. The best proof, however, of what he might have done is what others did that night under the same weather conditions, without hesitation or even a thought of complaint, although the danger was not as imminent and known to them as it was to Cradit.

McManus, the head brakeman of Extra No. 504 East, although dressed in a blue serge sack suit without an overcoat (75) went from the engine to the rear of his train at Dix, and then back to the engine and depot (69), was out in the storm cleaning switches and doing other work practically all the time his train was at Dix, being about one hour (70). His clothing became saturated with water from the melting snow at Dix (70). He had little protection from the weather in the engine cab where he rode throughout the night, and while at Mile Post 426 went back and forth between his engine and the office twice (72).

McGinnis, the head brakeman on Extra 501 East, also had his clothing saturated from the

melting snow (113-114). Was out in the storm considerable at Dix (101), and after the collision at Mile Post 426 walked from his engine the entire length of train No. 504 East to the telegraph office at Mile Post 426 (113); then walked back the same distance to his engine and then the length of his train Extra No. 501 East to the caboose; then walked from the caboose of No. 501 back to Mile Post 426, after No. 504 East had pulled out, then returned to the caboose again, of Extra No. 501 East (114). The distance from the caboose of Extra No. 501 East to Mile Post 426 was eighty car lengths, or half a mile (115).

Mr. Brendel, rear brakeman on Extra No. 501 East, dressed in the ordinary manner, walked from his caboose to the depot and the switches ahead of his train at Dix, and then back to his caboose (206 and 207). At the time of the collision at Mile Post 426, Brendel went back a quarter of a mile from the rear of his train to put down torpedoes and fusees, and then went forward to his engine (207), then went back to Herdon station three quarters of a mile from his caboose (207 and 208).

Glen Mann, the rear brakeman on passenger train No. 7, wearing his ordinary clothing with a light overcoat (261) went back from a quarter to a half mile to flag when his train was at Sidney at 12:45 A. M., and heard the whistle calling him in when his train was ready to leave. When his train arrived at Mile Post 426, at 1:20 A. M.,

he went back a half mile to flag, and also heard the whistle of his train at that station calling him in (259 and 260). At Kimball, Nebraska, the next stop west, he also went back to flag and was out in the storm from twenty to twenty-five minutes there (261).

Cradit, throughout the trip, was housed in a warm caboose between stations where he could warm himself and dry out his clothes.

McGinnis and McManus, head brakemen upon the two trains involved in the collision, had had no protection from the storm throughout the night, yet they did not hesitate to get out into the storm and perform the duties imposed upon them, although they were not clothed as warmly as was Cradit.

It is claimed in the brief of defendant in error that the deceased knew that the trains were being spaced on the night of the collision, hence was entitled to suppose that Extra No. 501 East would remain at Potter until his train left Mile Post 426. (Brief of defendant in error, p. 43.) But his conversation with Phillips at Mile Post 426 after his train had stopped and he had gone out of the front door of his caboose for a few moments, apparently to ascertain their location, in which he stated that he did not learn anything, but said: "I think they are spacing us, but I can't tell" (p. 213), indicates that he, himself, had not reached the conclusion that they were being spaced. Even if he had a right to suppose that the trains were

being spaced, the undisputed evidence is that spacing meant that Extra No. 501 East would only be held at Potter until Extra No. 504 East had arrived at Mile Post 426. It took his train twenty minutes to run from Potter to Mile Post 426. If "Spacing" meant that Extra No. 501 East would be released from Potter when his train arrived at Mile Post 426, then he was bound to anticipate that Extra No. 501 East would reach the point of collision in about twenty minutes, which accounts for his anxiety expressed in his conversation with his conductor upon the likelihood of Extra No. 501 East striking his caboose after his train had been standing at Mile Post 426 for thirty or forty minutes.

It is further said that Cradit could not have heard the flagging whistle from the front end of the train. His duty to flag did not depend upon the whistle, but upon the stopping of his train; but if it depended upon the whistle the record is uncontradicted that other brakemen heard the whistles of their trains that night while passing over the same district in the same storm. No witness said that the flagging whistle could not have been heard.

It is lastly claimed that in the case involving the death of the conductor, entitled *Phillips vs. Union Pacific R. R. Co.*, the Supreme Court of Nebraska unanimously affirmed the action of the trial court in refusing to instruct the jury as it did in this case, that deceased was guilty of contributory negligence as a matter of law. The

fact is that this contention was not discussed in the opinion in the Phillips case, but the decision was glossed over in an attempt to arrive at the same holding as in this case, regardless of the issues involved, and regardless of the holdings of this court in the Wiles case, which an examination of the opinion will demonstrate. The opinion in the Phillips case is an authority for no legal principle, but rather a demonstration of the human frailty to repeat a wrong rather than to frankly admit it.

(c)

The distinction that there was no negligence shown on the part of the Railroad Company in the Wiles case is equally fallacious. The whole discussion in the opinion in said case was based upon the assumption that there was negligence shown upon the part of the Railroad Company. Otherwise, there would have been no necessity for a comparison of negligences. If the negligence of the rear brakeman in the Wiles case was so inexcusable that it could not be compared with any negligence on the part of the Railroad Company, how much more inexcusable was the conduct of Cradit in this case where the length of time in which he had to perform his duty was many times that in the Wiles case. His conduct can lead to no other conclusion than that his neglect was willful, wanton and criminal, and in states having a criminal negligence statute would have subjected him to a prosecution for manslaughter on account of the death of passengers, had he lived.

II.

The Supreme Court of Nebraska erred in approving the action of the trial court in holding that the evidence in the record was sufficient to establish liability under the Federal Employers' Liability Act on each of the five acts of negligence submitted to the jury, and in submitting each of said charges of negligence to the jury with instructions that a verdict could be based upon any one thereof.

Among the five acts of negligence submitted to the jury by the trial court, particular stress was laid in our original brief upon the error of the trial court in permitting the jury to base a verdict upon the failure of the conductor of Extra No. 504 East, to be on his train at the time of the accident. (See original brief, page 45 (e). Pages 51 and 52. Discussion under (b) and (e).)

In the answer brief of defendant in error, an attempt is made to justify this action of the trial court on the ground that the operation of this train without a conductor for the seven miles between Potter and Mile Post 426, was a violation of the Full Crew Law of Nebraska; and also upon the supposition that had the conductor been on the train between Potter and Mile Post 426, he *might* have concluded that the engineer could not see the block signals and *might* have required the train to stop. The answer to the first justification is that the duty of the carrier

to its employes is fixed by the Federal Employers' Liability Act and applicable principles of Common Law as interpreted and applied in the Federal courts.

Southern Ry. Co. vs. Gray, 241 U. S., 233;
Seaboard A. L. vs. Horton, 233 U. S., 492;
Central Vt. Ry. vs. White, 238 U. S., 507;
Great Northern Ry. vs. Wiles, 240 U. S.,
444.

No causal connection was shown between this act and the injury and even if a state statute were applicable, it cannot supply such causal connection where none exists in fact.

The second justification is not sound because it is based upon what the conductor *might* have done, rather than what in all reasonable probability he would have done. The fact that he had proceeded as far as Potter with his train without protest, belies the contention that he *might* have protested after leaving Potter.

Particular stress was also laid in our original brief upon the error of the trial court in submitting to the jury, as an independent act of negligence, the conduct of Assistant Superintendent Sage in ordering Extra No. 510 West to proceed westward from Sidney. (Original brief, pp. 41 to 44 (b), pp. 51 and 52 (b).)

Defendant in error justifies the submission of this issue to the jury, on page 36 of his brief, as follows:

"To this we say that there were a number of trains on the road that night in the blizzard. One of the things to be anticipated in operating trains in a blizzard is that because of poor visibility, collisions are liable to occur,"

and that a train heavily loaded would stall, and in that way increase the possibilities of a collision.

If this act of the Assistant Superintendent could, under any consideration, be held to be causal, in whole or in part, the record shows that Cradit had been advised of the dispatch of Extra No. 510 West to proceed westward from Sidney, and was thereafter kept advised at each station of the progress of said train. If, as defendant in error says, the collision was to be anticipated in view of the condition of the storm, Cradit had as much information on the movement of the train as the Assistant Superintendent, and more information on the effect of the storm upon the movement of the trains than either the Assistant Superintendent or the Dispatcher. He made no complaint of this danger but continued in his employment and on his journey in the face of this apparent danger, and must, therefore, be held to have assumed the risks arising from this danger.

III.

The Supreme Court of Nebraska erred in approving the action of the trial court in instructing the jury that under the law governing said case, a servant or employe does not assume any risks or dangers arising

from negligence of the master or employer, thereby denying to plaintiff in error the defense of assumption of extraordinary risks available to it under the Federal Act.

The failure of the trial court to give to plaintiff in error the benefit of the defense of assumption of extraordinary risks is justified in the brief of defendant in error, on the ground that the defense was not pleaded, and also on the ground that it was not available as a defense to the alleged negligent act of the engineer of Extra No. 501 East in running past the block signals. The Supreme Court of Nebraska in the opinion in this case held that the failure to give plaintiff in error the benefit of the defense of the assumption of extraordinary risks, was not error in this case because the evidence did not raise such an issue concerning any of the acts of negligence charged, but the fallacy of this contention, we think, is clearly shown in our original brief in connection with the discussion of the sufficiency of the evidence to sustain the acts of negligence designated in our brief by the letters (a), (b), (c) and (f); also in the discussion of this question on pages 52 and 56, inclusive, of our original brief. This case was tried in the trial court on the theory that the defense of extraordinary risks had been properly plead. It was argued in the Supreme Court of Nebraska upon the same theory. Defendant in error neither challenged the sufficiency of the pleading of this defense in the trial court nor in the Supreme Court, and the opinion of the Supreme Court of Nebraska in this case assumes that the defense was properly plead.

The Phillips case referred to in the brief of defendant in error was also tried upon the theory that this defense was plead in the answer to the petition, and the question that it was not plead in said answer was only raised for the first time in the brief of defendant in error filed in the State Supreme Court in the Phillips case. The Supreme Court of Nebraska had then discovered that under the decisions of the Federal Court this defense was still available to the Railroad Company, and compelled a reversal of the Phillips case unless the defense could be denied for some technical reason, and without directly deciding the question contented itself with a mere recital in the opinion that "the defense that plaintiff assumed the risks of defendant's negligence should have been specially pleaded." Such an injustice, we trust, will not prevail in this court, especially in view of the holding of this court in *San Juan L. Co. vs. Requenna*, 224 U. S. Rep. 89, wherein this court held:

"Where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case is in the appellate court for review."

To the same effect is the holding in *Bank of Havelock vs. Western Union*, 141 Fed. 522.

The issue of the defense of assumption of extraordinary risks was not raised solely in connection with the negligent act designated as (f)

in our former brief, as has been assumed by defendant in error in his answer brief, but was also available and presented by the evidence in connection with the defense to negligent acts designated as (a), (b) and (c) in our original brief.

V and VI.

The Supreme Court of Nebraska erred in approving the action of the trial court in determining and fixing the amount that the gross damages should be reduced on account of the contributory negligence of the deceased, after the jury had expressly refused to make any such reduction, although instructed to do so by the court.

Defendant in error in his answer brief justifies this alleged error on the ground that a remittitur is permissible under the Nebraska practice in an ordinary negligence case, and relies upon the Federal cases discussed in our first brief, which we claimed therein were not decisive or controlling; and also relies upon the case of *Saar vs. A. T. & S. F. Ry. Co.*, 155 Pacific Rep. (Kans.), 954. In that case Justice Marshall, in a dissenting opinion, analyzes the requirement of the Federal statute as follows:

“The determination of the amount by which damages shall be diminished by the jury on account of the negligence of an injured employe under the federal Employers’ Liability Act is by that act placed within

the province of the jury. The act fixes no rule by which to determine the amount that shall be allowed on account of the contributory negligence of an employe engaged in interstate commerce, except that the damages shall be diminished in proportion to the amount of negligence attributable to such employe. It is the duty of the court to instruct the jury concerning this matter. It then becomes the duty of the jury to determine what shall be deducted because of the contributory negligence of the employe. This must be arrived at under the evidence in each case by the jury, and its conclusion is binding unless the result shows the influence of passion or prejudice, or is not supported by any evidence. The judgment should be reversed and a new trial ordered, or it should be affirmed."

This question was squarely before the Ohio Circuit Court in the case of *Railroad Co. vs. Wasson*, 21 Ohio C. C. Rep. (N. S.) 481, wherein the trial court had made a reduction of the general verdict for the contributory negligence of the injured party after the jury had failed to make any reduction. This case was prosecuted under the Federal Employers' Liability Act, and the court, in an opinion by Justice Pollock on this question, said:

"The question presented by this verdict is not one of excessive damages which the court may modify by a remittitur, but it

presents a question of the jury's failure to return a verdict under the statute in this case. The statute requires that, where the employe is guilty of contributory negligence, the jury shall diminish the damages in proportion to the negligence of the employe. This it failed to do. *By entering judgment after a remittitur had been made, the court was not reducing an excessive verdict, but was determining a question of fact which the law required the jury to determine. This we think the court could not do.*" (Italics are ours.)

In the case of *M. K. & T. Ry. Co. vs. Pace*, 184 S. W. (Ct. of Civ. A. Tex.) 1051, which was an action prosecuted under an employers' liability statute similar to the Federal Statute, the court in the syllabus held:

"In a servant's action for injuries arising out of and in the course of his employment, defended on the ground of contributory negligence, the issue of the amount to which his compensation should be reduced by reason of such contributory negligence, *must be submitted, no standard for determining whether the compensation allowed is excessive being otherwise possible.*" (Italics are ours.)

Respectfully submitted,

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*Attorneys for Plaintiff
in Error.*



SUPREME COURT

OF THE
UNITED STATES

October Term, 1917. Number 174

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF
IN ERROR.

VS.
CHARLES M. HADLEY, AS ADMINISTRATOR OF THE
ESTATE OF CHARLES M. GRANT, DECEDENT,
RESPONDENT IN ERROR.

ON WRIT OF HABEAS CORPUS OF THE STATE OF NEBRASKA.

WRIT OF HABEAS CORPUS.

JOHN T. WALKER, JAMES J. HARRISON, C. FREDERICK
HARRIS, W. W. HARRIS, AND JAMES M. WALKER, Counsel for
Respondent in Error.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1917. Number 495.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF
IN ERROR,

VS.

CHARLES M. HADLEY, AS ADMINISTRATOR OF THE
ESTATE OF CHARLES M. CRADIT, DECEASED,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

WESLEY T. WILCOX, JOHN J. HALLIGAN, C. PETRUS PETERSON,
ROBERT W. DEVOE, AND JOSEPH M. SWENSON, *Counsel for*
Defendant in Error.

STATEMENT OF THE CASE.

This action is a suit at law under the Federal Railroad Employer's Liability Act of April 22nd, 1908, brought by the defendant in error (hereinafter called the plaintiff) to recover for the death of Charles M. Cradit deceased, alleged to be caused by the wrongful and negligent acts of the plaintiff in error (hereinafter called the defendant). The substantive averments of the petition (Printed record, pp. 2-6) were as follows:

1.

That on the morning of the 14th day of March, 1913, Charles M. Cradit departed this life in the manner hereinafter fully set forth. And that this plaintiff, Charles M. Hadley, was, by the county court of Cheyenne county, Nebraska, a court of competent jurisdiction, on the 13th day of June, 1913, duly appointed administrator of the estate of said Charles M. Cradit; that he duly qualified; letters of administration were issued to him, and that he is now the duly acting and qualified administrator of said estate.

2.

That the defendant, the Union Pacific Railroad Company, is a corporation, organized and existing under the laws of the state of Utah, and is engaged in the business of carrying freight and passengers by railroad for hire, to and from Omaha, Nebraska, through the states of Nebraska, Colorado,

Wyoming and Utah; and that the said defendant was so
4 engaged in interstate commerce as a common carrier, by railroad, on the 13th and 14th days of March, 1913.

3.

That on the 13th day of March, 1913, the deceased, Charles M. Cradit, was employed by and worked for the said defendant as brakeman, in its business of interstate commerce, and that at said date said deceased resided in the city of Sidney, Nebraska, and was employed in said business of interstate commerce as a brakeman on trains running from the city of Sidney, Nebraska, to the city of Cheyenne, in the state of Wyoming.

4.

That on March 13th and 14th, 1913, a blizzard raged in western Nebraska, and particularly between Sidney, Nebraska, and Cheyenne, Wyoming; that the wind blew with such a velocity that it was impossible for a man to walk and make headway against it; that a heavy snow was falling and blow-

ing and drifting to such an extent that it was impossible to see more than fifty feet through said storm during said 13th and 14th days of March, 1913, and that by reason of said blizzard and the conditions then prevailing, it became and was dangerous and unsafe to run and operate railroad trains in such a manner that one followed the other closer than the distance between telegraph stations on said railroad.

5.

That the trains on that portion of defendant's railroad situated between Sidney, Nebraska, and Cheyenne, Wyoming, were on said 13th and 14th days of March, 1913, operated and controlled by the train dispatcher at Sidney, Nebraska, who was fully aware of the condition of the weather and the dangers which might result thereby to the operation of trains.

6.

Plaintiff further alleges that on the evening of March 13, 1913, the deceased, Charles M. Cradit, was called to go out as brakeman upon a freight train, from Cheyenne, Wyoming, to

Sidney, Nebraska; that he responded to such call, and
5 that at about ten minutes past six o'clock P. M., of March

13th, he left said city of Cheyenne, Wyoming, as rear brakeman on a freight train, known as Extra 504 East, loaded with interstate freight consigned to various stations outside of the state of Wyoming.

7.

That at the time said deceased left the city of Cheyenne it was raining and snowing and the wind blowing with great velocity, and that said storm continued to increase in severity as said train proceeded on said railroad east; that so severe had said storm become that when said train arrived at Dix, Nebraska, a station on said road, said train was run in upon a side track and the condition of the weather and the difficulties of proceeding with safety with said train farther

reported by the conductor of said train, Ray C. Phillips, to W. A. Borton, train dispatcher, at Sidney, Nebraska.

8.

This plaintiff further alleges, that while at the station of Dix, Nebraska, freight train known as Extra 501 East, bound from Cheyenne, Wyoming, to Sidney, Nebraska, came up on the main track along deceased's train, Extra 504 East, and that both of said trains were present at said station of Dix at the same time. All of which was known to the train dispatcher at Sidney, Nebraska, in charge of and operating said trains.

9.

Plaintiff further alleges that said train dispatcher, W. A. Borton, regardless of his duties to the deceased and other employees of said defendant Company and the passengers of said train, and with full knowledge of the conditions of the weather and the dangers incident to operating trains in such a blizzard wilfully, carelessly and negligently ordered train Extra 504 East to proceed east to Sidney, and immediately thereafter, with full knowledge of the conditions of the weather and the dangers incident to operating trains in
6 such a blizzard, wilfully, carelessly and negligently and unlawfully ordered train Extra 501 East to proceed on to its destination over said railroad to Sidney, Nebraska, and to follow train Extra 504 East in close proximity.

10.

Plaintiff further alleges that G. D. Sage is an officer of defendant corporation, known as assistant superintendent of the Fourth district, the same being the district between Sidney, Nebraska, and Cheyenne, Wyoming; that as such officer he had charge of the making up and sending out of trains from the terminals of Sidney and Cheyenne; that on the morning of March 14, 1913, he was present in Sidney, and was fully cognizant of the blizzard raging at that time between Sidney and Cheyenne, and the dangers incident to the operation of

trains caused by such blizzard, and that regardless of his duties to the employees of said road operating trains and to passengers thereon he wilfully, carelessly and negligently ordered train known as Extra 510 West made up and ordered it to proceed from Sidney, Nebraska, to Cheyenne, Wyoming, on said railroad; that said train was a freight train and left Sidney, Nebraska, at 1:10 A. M. on the morning of March 14, 1913; that so severe was said blizzard that said train consumed one hour and fifty-five minutes in going from Sidney to Mile Post 426, a distance of about eleven miles, and that when said train Extra 510 West arrived at said Mile Post 426 the engine hauling said train was out of water and was compelled to abandon said train, and the dispatcher, at Sidney, Nebraska, was so notified by the engineer of said engine whose name is unknown to the plaintiff herein. That on said 13th and 14th days of March, 1913, the station known as Mile Post 426, was the end of the double track from Sidney west, and situated twelve miles west of Sidney. That there was at that time a telegraph station located there and also there stationed a telegraph operator, both at day and night time, and that said W. A. Borton, dispatcher, as afore-

7 said, was notified of the conditions of the engine of Extra 510 by said telegraph operator at Mile Post 426. That when said dispatcher was notified of the condition of said engine he wilfully, carelessly and negligently and without regard to the safety of the employees of said defendant Company or the passengers riding on its said train, issued an order to train Extra 504, to stop at Mile Post 426, and take the engine, which had been drawing Extra 510 West and which was incapacitated by reason of the fact that it was out of water, back to Sidney, Nebraska, notwithstanding the fact that he had ordered train Extra 501 East to follow 504 and knew that it was following said 504 in close proximity and knew that by reason of the conditions of the weather and the blizzard raging at said time it was difficult for the men operating said train to see the signals and to give and take signals in the operation of the said train.

11.

Plaintiff further alleges that the engineer of train Extra 504 East, James Zalesky, then reported to said train dispatcher the condition of the weather, the difficulties encountered in giving and taking signals and asked said train dispatcher to be permitted to proceed to Sidney, without picking up engine 510 and attaching it to his train. That said train dispatcher, W. A. Borton, with full knowledge of the severity of the blizzard raging and the difficulties of giving and taking signals and with full knowledge that train Extra 501 was following train Extra 504 in close proximity, wilfully, negligently and unlawfully, and with a wanton disregard for the safety of the employees of said train and the passengers thereon, refused such permission and ordered said train Extra 504 to stop and pick up engine 510, and to take the same to Sidney, Nebraska.

All of which said trains, to-wit: Extra 501 East, Extra 504 East, and Extra 510 West, were running without headlights because the severity of the storm was such that the acetylene headlights on said engine could not be kept lit.

12.

8 Plaintiff further alleges that the defendant Company, on the 13th and 14th days of March, 1913, as aforesaid, had installed on its said railroad, between Sidney, Nebraska, and Cheyenne, Wyoming, a system of signals known as block signals by which, in the night season, a red light is always displayed in the rear of each moving train, at various distances therefrom, but always at sufficient distance to enable the engineer of one train following another to stop before striking the preceding train. That the rules of said defendant Company prohibit and forbid an engineer from running by or past a red signal light or from running by or past a signal that does not display a green signal light, that being the signal that the track is clear. That on the night in question there was a signal to the rear of train Extra 504, at sufficient dis-

tance to enable the engineer of Extra 501, to stop said train before colliding with Extra 504.

13.

Plaintiff further alleges that train Extra 504 East, was a freight train and then being operated east of Potter, to Mile Post 426, and at the point where the accident herein described occurred was outside of the yard limits. That the defendant herein negligently, carelessly and wantonly failed and neglected to take on the conductor of Extra 501 at Potter, and negligently, carelessly and wantonly proceeded with said train from Potter, Nebraska, to Mile Post 426 and to the point where the accident described herein occurred. That it is the duty of the conductor of said train to observe the block signals stationed along said railroad and that by so leaving said conductor at Potter, and operating its said train as aforesaid, without said conductor, it deprived said train of the care and management of said conductor thereby endangering the lives of the employees of said defendant and the passengers riding on said train.

14.

Plaintiff further alleges that on the night in question, to-wit: the night of March 13th and 14th, 1913, said train 501, negligently operated as aforesaid, without a conductor and without a headlight, carelessly and negligently failed and neglected to observe the signals immediately to the rear of Extra 504 East, and carelessly and negligently ran on and into the rear of 504, thereby demolishing and destroying the caboose of said train Extra 504, in which deceased, Cradit, was at the time of said accident, and thereby causing his immediate death. That the death of Charles M. Cradit was caused by the negligence of the defendant Company and of its employees through the grossly negligent manner and method of ordering out, dispatching and operating said trains as aforesaid on said 13th and 14th days of March, 1913.

15.

The plaintiff further alleges that the said Charles M. Cradit, at the time of his death, was thirty-one years of age; was in sound health of body and mind; of temperate and industrious habits; was capable of earning and was earning at said time the sum of \$110.00 per month. That he left surviving him his widow Edith Cradit, and the following named children, to-wit: Violet B. Cradit, aged five years, and Grace Cradit, aged two years, for whose benefit this action is prosecuted and no others. And that said widow and children were solely dependent upon the said Charles M. Cradit, for their support and maintenance, and that they have sustained damages by reason of the aforesaid wrongful acts, neglects and defaults of the said defendant causing the death of the said Charles M. Cradit, in the sum of \$50,000.00, and that this suit is brought on behalf of and for the benefit of said Edith Cradit, Violet B. Cradit, and Grace Cradit, by the plaintiff herein.

Wherefore, plaintiff herein prays for judgment against
10 the defendant for the sum of \$50,000.00 and costs of suit.

The defendant's answer, omitting the formal allegations, is as follows (Printed record, pp. 7-9):

Comes now the defendant and for answer to the petition of the plaintiff, filed herein, states:

1.

Admits that Charles M. Cradit departed this life on the morning of the 14th day of March, 1913.

11 Admits that this defendant is a corporation organized and existing under the laws of the state of Utah, and is now, and was on the 13th and 14th days of March, 1913, engaged in the business of carrying freight and passengers by railroad for hire to and from Omaha, Nebraska, through the states of Nebraska, Colorado, Wyoming and Utah.

3.

Admits that on the 13th day of March, 1913, the deceased, Charles M. Cradit, was employed by and worked for this defendant as a brakeman.

4.

Admits that on the evening of March 13, 1913, the deceased, Charles M. Cradit, was called to go out as a brakeman upon a freight train from Cheyenne, Wyoming, to Sidney, Nebraska; that he responded to such call and left said city of Cheyenne, Wyoming, at about the hour of 6:10 P. M. of said 13th day of March, 1913, as rear brakeman of a freight train known as Extra 504 East.

5.

Admits that freight train known as Extra 501 East, bound from Cheyenne, Wyoming, to Sidney, Nebraska, and freight train known as Extra 504 East, were present at the station of Dix, Nebraska, at the same time during the trip of Extra 504 East, hereinbefore referred to.

6.

Admits that on said 13th and 14th days of March, 1913, the station known as Mile Post No. 426, was the end of the double track from Sidney west, and was situated about 12 miles west of Sidney; admits that at that time there was a telegraph station located there and also a telegraph operator;

admits that on the morning of March 14, 1913, an order 12 was issued to train Extra 504 East to stop at Mile Post 426, and take the engine which had been drawing 510 West, back to Sidney, Nebraska.

8.

Admits that on the 13th and 14th days of March, 1913, defendant had installed on its said railroad between Sidney, Nebraska, and Cheyenne, Wyoming, a system of signals known as "block signals," by which, in the night season, a red light

is always displayed in the rear of each moving train at various distances therefrom.

9.

Admits that on the nights of March 13th and 14th, 1913, train Extra 501 East ran on and into the rear of train Extra 504 East, near Mile Post 426, thereby demolishing the caboose of said train Extra 504, in which the deceased, Charles M. Cradit, was at the time of said accident, and that the said Charles M. Cradit died as a result of said collision.

10.

Denies each and every allegation in said petition contained not herein specifically admitted to be true.

11.

Further answering said petition this defendant alleges that the injuries to, and death of the said Charles M. Cradit, were due solely and exclusively to his own carelessness and negligence and not to any carelessness or negligence upon the part of this defendant, and were due solely and exclusively to dangers and risks which were open, apparent and known to the said Charles M. Cradit, were incident to his employment and assumed by him.

12.

This defendant alleges that the plaintiff herein does not have sufficient capacity to prosecute this action herein.

Wherefore, this defendant, having fully answered, prays that it may be dismissed hence and have judgment against plaintiff for its costs herein expended.

13 The reply was a general denial.

A trial by jury in the district court of Cheyenne county resulted in a verdict of \$25,000.00 in favor of plaintiff, apportioned to the three beneficiaries as follows: to Edith Cradit, \$15,000.00; to Violet B. Cradit, \$5,000.00; to Grace Cradit, \$5,000.00.

Three special findings were submitted to the jury at the request of the defendant, which are as follows (Printed record, p. 30) :

1.

"The total amount of damage, which you find the wife and children of Charles M. Cradit have suffered by reason of his death \$. twenty-five thousand dollars (\$25,000.00) dollars.

2.

"The amount you find should be deducted from the above sum by reason of the negligence of the said Charles M. Cradit \$. Nothing.

Plaintiff excepts.

W. W. CHOWINS,
Foreman.

3.

"Was there a conversation between Engineer Cameron and Conductor Phillips in the presence of Brakeman Cradit and Fireman Long on the engine 501, while the same was standing at Dix, to the effect that it was difficult for Engineer Cameron to see the signals, and that in case Conductor Phillips' train was stopped a good job of flagging would be done and plenty of fusees thrown out?"

No conversation. No.

W. W. CHOWINS,
Foreman."

From the rendition of the verdict the defendant filed a motion for a new trial alleging 69 different reasons why a new trial should be granted. On the hearing of the motion for a new trial (Printed record, pp. 41-42), the court held:

"That the verdict is excessive in amount; that the jury disregarded the instructions of the court, in failing to deduct from the damages sustained by the plaintiff, any amount attributable to contributory negligence of the deceased, Charles M. Cradit.

"It is therefore ordered and the plaintiff is hereby required to remit from said verdict the sum of \$10,000.00 from the amount of said verdict, for the amount to be deducted because of the contributory negligence of the

deceased, Cradit, and because said verdict was in excess of the amount plaintiff should recover or new trial be granted.

"Whereupon said cause came on further to be heard upon the motion of the defendant, requiring court to state how much of said verdict was in excess of the amount plaintiff should recover, and how much should be credited or how much the verdict should be diminished because of the contributory negligence of the deceased.

"And on consideration thereof the court requires a remittitur of \$10,000.00 in full of both and refuses to fix an exact amount of either."

Whereupon the plaintiff filed a remittitur in the sum of \$10,000.00, from the verdict, and judgment was rendered in favor of the plaintiff and against the defendant for \$15,000, apportioned to Edith Cradit \$5,000.00, to Violet B. Cradit \$5,000.00, and to Grace Cradit \$5,000.00.

The widow Edith Cradit had filed a remittitur in court remitting from her portion of the judgment said sum of \$10,000.00.

An appeal was taken from this judgment by the defendant, and said judgment unanimously affirmed by the supreme court of the state of Nebraska, on condition that defendant make a further remittitur of \$1,500.00 (Printed record, pp. 298-305). Thereafter the plaintiff made a further remittitur from the said judgment theretofore obtained of \$1,500.00, whereupon judgment was entered in the supreme court of the state of Nebraska, against the defendant for \$13,500 with interest thereon from October 8th, 1913 (Printed record, p. 306).

The controlling question on the present writ of error is: Did the supreme court err in affirming the judgment of the district court of Cheyenne county? Plaintiff in error has the burden here of showing prejudicial error in the proceedings of the trial court. Whether the highest court of the state was precise and accurate in all of its statements made in its opinion, or whether the reasons assigned for affirmance are in

all respects correct, are not controlling in this review. If the proceedings of the trial court, insofar as they interpret and apply the acts of Congress in question, are free from error, then as a matter of course the judgment should be affirmed, and it will not be material whether the reasons assigned for affirmance by the supreme court were right or wrong. The question for consideration is whether the trial court committed reversible error.

The application of the acts of Congress to this case as made by the trial judge are embraced in paragraphs 5, 6, 10, 11, 12, 13, 14, 15 and 16 of the court's instructions which are as follows:

"The gist of plaintiff's action is that the death of Charles M. Cradit was caused by negligence of the defendant Railroad Company in the operation of its trains on its tracks at or near what was called Mile Post 426 on the night of March 13 and 14, 1913. Facts which 23 are alleged by one party and admitted by the other in the pleadings do not require any proof; so that the negligence of the defendant, and that such negligence was the cause of the injury to Charles M. Cradit that resulted in his death, and that his death was not the result of his own negligence, are among the decisive questions for you to pass upon in this case.

"It rests upon the plaintiff to prove by a preponderance of the evidence the facts necessary for his recovery; that is, that the death of Charles M. Cradit resulted from an injury inflicted upon him by the defendant Railroad Company in the negligent and careless operation of its railroad in running its trains at the time and place set out in the petition.

"If the plaintiff establishes this fact by a fair preponderance of the evidence, then the burden will rest upon the defendant to establish by a fair preponderance of the evidence that the negligence and carelessness of the said Charles M. Cradit was the proximate cause of the injury that resulted in his death, or that his negligence contributed to his injury and death.

6.

"This action is brought under what is called the Employer's Liability Act a law passed by the United States Congress, which law provides that every common carrier by railroad, while engaged in commerce between any of the several states, shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of the death of such employee to his personal representative for the benefit of the surviving widow and children of such employee, for such injury or death, resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, or in its cars, engines, appliances, machinery, track, roadbed, or other equipment.

24 That in all actions brought against any such common carrier by railroad, under this act, to recover damages for personal injuries, or where such injuries result in his death, the fact that such employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such.

10.

"If, under the evidence and these instructions, you find for plaintiff, then I charge you that the measure of the damages, the amount plaintiff is entitled to recover, is such sum as will compensate the widow and minor children of the deceased Charles M. Cradit, in whose behalf the plaintiff sues, for the pecuniary loss, if any, that they may have suffered by reason of the death of said Charles M. Cradit, less such sum, if any, you find such damages should be diminished by reason of contributory negligence on the part of said Charles M. Cradit. The law does not permit the recovery of remote or speculative damages, or damages as punishment. In determining what the amount of the recovery should be, you are entitled to take into consideration the occupation of the deceased, his earning capacity at his occupation, and the reasonable probability, as shown by the evidence, of his future earnings; and in this connection you are entitled to consider the Carlisle Tables of Expectancy introduced

in evidence and showing the reasonable expectancy of life of a healthy person of the age of thirty-one years to be 33 and 68/100 years.

11.

"The deceased Charles M. Cradit, left surviving him his widow, Edith Cradit, and two children, Violet B. Cradit, aged five years, and Grace Cradit, aged two years. This action is brought by plaintiff on behalf of the said widow and children.

"If under the evidence in this case you find for the plaintiff, then you are required, under the law under which this action is brought to find and return by your verdict how much of the total sum you find plaintiff shall recover shall be for the benefit of the widow, Edith Cradit; how much shall be for the child Violet Cradit, and how much shall be for the child Grace Cradit, and show the same by your verdict.

If under the evidence you find that plaintiff is not entitled to recover, then you should return a verdict, finding for defendant.

12.

"The jury is instructed that the evidence in this case shows that the deceased, Charles M. Cradit, was guilty of contributory negligence in not guarding the rear end of his train on its arrival at the station Mile Post 426.

"In this connection I instruct you that the Act of Congress under which this suit is brought provides that such contributory negligence does not defeat or bar a recovery on the part of the plaintiff altogether but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the said Charles M. Cradit.

"So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the said Charles M. Cradit does not defeat a recovery by the plaintiff herein, but it goes by way of diminution of damages in proportion to his negligence as compared with the combined negligence of himself and the defendant Company.

13.

"The jury is further instructed that if you find from the evidence that the defendant was not negligent, or that the said Charles M. Cradit, received the injuries which resulted in his death without any negligence on the part of the defendant, or that the injuries received that resulted in his death were the result of his own negligence; that his own negligence was the proximate cause of his death, then you will return a verdict for the defendant.

14.

"Testimony has been received in the trial of this action showing that acetylene lights used on engines 501, 504 and 510 went out; that when the acetylene lights went out, lighted lanterns were placed in the head light of the engine and used in the place of the acetylene light; the difficulty of seeing the block signals and other signals used; the snow in the air and the velocity of the wind.

"All this evidence was received, not as evidence of any negligence on the part of the defendant Company, but as facts and circumstances to aid the jury to determine from this evidence, together with all the other evidence shown during the trial, the severity of the storm at the time and place of the accident or wreck.

15.

"It is a question of fact for you, Gentlemen of the Jury, to determine from the evidence, whether the injury that caused the death of Charles M. Cradit was because of the negligence of the defendant Company.

"The defendant Company acts by its agent and employees, and is chargeable with the results of its agents and employees in the management and operation of its trains. The presumption, in the absence of any evidence, is that neither party was negligent or careless; that the defendant Company and its employees exercised reasonable care, prudence and consideration for the employees engaged in the management and running of its trains, also that the deceased, Charles M. Cradit, used like care, prudence and consideration to protect himself and avoid injury while employed by defendant in the operation of its trains. This presumption continues as

to both the deceased and the defendant until the contrary is shown by the evidence.

"The degree of care required of the defendant in protecting the deceased from injury was the adoption of all reasonable means and precautions to provide for the safety of the deceased while he was engaged in his employment, and this degree of care is to be measured by the dangers to be apprehended or avoided. The defendant was under obligation to not expose the deceased, in conducting its business, to perils or hazards which the defendant could have guarded against by proper diligence.

"The engineer on train 501, the Dispatcher and Assistant Superintendent at Sidney, all represented the defendant in their respective stations, and failure upon their part, or upon the part of either of them, in the exercise of such reasonable diligence, caution and foresight as an ordinarily prudent man would exercise under similar circumstances to guard the deceased from injury, was negligence of the defendant.

"In determining the question of the defendant's negligence, if any, it is competent for you to consider the character and severity of the storm at the time and place of the collision; the block signals maintained by defendant to give warnings of danger; the ability of persons to see signals by lantern, fuseses, and torpedoes; the orders, if any, that were given by the dispatcher, and the assistant superintendent at Sidney, or by either of them; the knowledge, if any, that either the dispatcher or the assistant superintendent had as to the severity of the storm; of the ability or inability of the train men to see the block signals at the time they gave any orders as to the running of the three trains in question, if they, or either of them gave any orders; the degree of diligence or lack of diligence they are shown to have exercised to avoid injury to the deceased; that care or lack of care on the part of the engineer running train Extra 501 to see train Extra 504 and avoid running into it.

"On the part of the deceased, it is competent for you to consider his opportunities to discover and avoid the danger to which he might be exposed; his conduct in the matter of precaution or lack of precaution in flagging the

train he was on, to avoid its being run into by train Extra 501, and thereby avoid danger. In short, 29 you will consider all the facts and circumstances shown in the testimony bearing upon the conduct of the defendant and the deceased.

"If, upon consideration of all the testimony you find that the injury which caused the death of Charles M. Cradit, was the proximate result of the negligence of the defendant or its employees, then, you should find for plaintiff as directed in Instruction No. 10.

16.

"As one of the defenses the defendant pleads what is known and called assumption of risk. You are instructed as a matter of law that a servant or employee assumes the ordinary risks and dangers incident and peculiar to the employment upon which he enters but he does not assume any risk or dangers due to the master's or employer's negligence, nor does he assume risks or dangers arising from sudden, unforeseen circumstances, not ordinarily incident to his employment.

"The employer relies, as he has the legal right to do, upon the presumption that due care will be exercised by each employee to avoid injury to himself, and by each employee to avoid injury to his co-employees.

"In this case, when the deceased accepted his employment as brakeman for the defendant Company he assumed all the risks and hazards incident and peculiar to the business of brakeman in the business of operating and running trains and handling cars by the defendant Company in its business of carrying on interstate commerce by railroad.

"It is for you, Gentlemen of the Jury, to determine from all the evidence in this case, from all the facts and circumstances shown on the trial, whether or not the injury and death of the deceased, Charles M. Cradit, was because of the risks and hazards incident and peculiar to the employment in which he was engaged.

30 "If, from all the evidence, you find that the injury and death of the said Charles M. Cradit, was due to and the result of the risks and hazards incident and peculiar to the business of brakeman in the operation and

running of trains, then plaintiff cannot recover herein; and if you so find, you will return a verdict finding for the defendant."

Under these instructions the questions submitted to the jury were: Did the death of Charles M. Cradit result from an injury inflicted upon him by the defendant Railroad Company in the negligent and careless operation of its railroad in running its trains at the time and place as set out in the petition?

That in the event that the plaintiff established such facts by a preponderance of the evidence then the burden rests upon the defendant to establish by a preponderance of the evidence that the negligence and carelessness of said Charles M. Cradit was the proximate cause of the injury that resulted in his death, or that his negligence contributed to his injury and death. That the deceased at the time of his death was employed in interstate commerce, and that under the Employer's Liability Act the defendant Company was liable to the plaintiff, if the death of the deceased Charles M. Cradit resulted in whole or in part from the negligence of the officers, agents or employees of such carrier, and that the fact that such deceased, Cradit, might have been guilty of contributory negligence did not bar a recovery, but the damages should be diminished by the jury in proportion to the amount of negligence attributable to the deceased.

That the evidence in the case showed that the deceased Charles M. Cradit was guilty of contributory negligence in not guarding the rear end of his train on its arriving at Mile Post 426, but that such negligence did not defeat or bar a recovery on the part of the plaintiff, but the damages should be diminished by the jury in proportion to the amount of negligence attributable to the said Charles M. Cradit, and that if the jury reached such a point in their deliberation where they found it necessary to consider the defense of contributory negligence, the negligence of said Charles M. Cradit did not defeat a recovery by the plaintiff herein, but went to a

diminution of damages in proportion to his negligence as compared by the combined negligence of himself and the defendant Company.

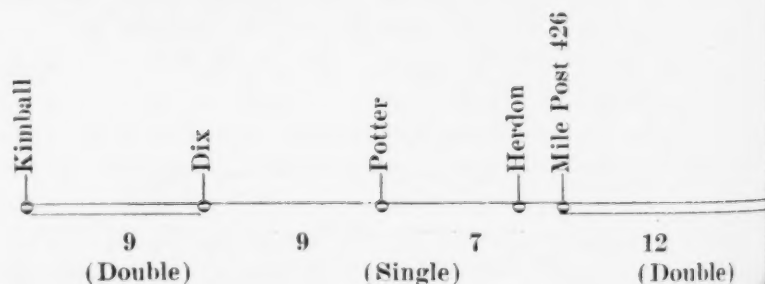
ARGUMENT.

I.

The supreme court of Nebraska did not err in holding that there is evidence in the case sufficient to establish a liability under the Federal Employers' Liability Act upon the acts of negligence charged in the petition.

The brief of plaintiff in error is for the most part addressed to the contention that the evidence adduced by the plaintiff below did not authorize the submission of the case to the jury, and that there was error in so doing, and that there is no evidence in the record to sustain a verdict and judgment in favor of the plaintiff below.

It will be necessary to discuss the evidence in the record on this point, and in order to assist the court in understanding the evidence we have made a map of the Union Pacific Railway from Sidney, Nebraska, on the east, to Kimball on the west. This map is drawn on a scale of eight miles to the inch, it shows the location of the station Mile Post 426 where the accident occurred, and the approximate location of other points on the road between Kimball on the west and Sidney on the east; it also shows the portions of the track that were double tracked and the portions that were single tracked. The numerals indicate distance in miles between stations:



The division of the railroad on which this accident occurred is known as the Fourth division, and extends between Sidney, Nebraska, and Cheyenne, Wyoming, on the west. The accident occurred at a point known and shown on the map as Mile Post 426, 12 miles west of Sidney, which point was the end of the double track from Sidney west, and at which point the two tracks to the east converged to the single track, and extended in a single track from Mile Post 426 to Dix, where it then again diverged to a double track.

Mile Post 426 was a temporary station established there because it was the western end of the double track and an operator was stationed in a dismantled freight car. The next station west of Mile Post 426 is Herdon, distant from Mile Post 426 about $1\frac{1}{2}$ miles; the next station west of Herdon is Potter, distant from Sidney 19 miles and from Mile Post 426, 7 miles. The next station west of Potter is Dix, distant from Mile Post 426, 17 miles, and from Sidney, 28 miles; the next station west of Potter is Kimball, distant from Sidney, 37 miles, and from Mile Post 426, 25 miles. The single track on this point of road extended from Dix to Mile Post 426. The Union Pacific railroad at this point and at all other points was and is equipped with what is known as an automatic block signal system, by which the track is divided into blocks, and by which a red light is always displayed one block in the rear of each train and which remains lit until the train enters a block ahead when the light turns to green; and under this automatic block signal system all trains are protected by a red light such distances to the rear as to enable any train following to come to a full stop before collision.

The three trains involved in this wreck are Extra 504 East, Extra 501 East and Extra 510 West, all of these trains being involved in the collision. All extra freight trains take their numbers from the engine pulling the train, and the words "east" or "west" indicate the direction in which the trains are moving. 504 East was ordered out of Cheyenne, Wyoming, about 6:30, it was snowing a little at that time, and

as the train proceeded east the storm grew in intensity. When the train arrived at Dix a blizzard was raging which was described by witnesses as the worst they had seen in 30 years residence in that country. Train 504 East took the sidetrack at Dix; train 501 East left Cheyenne about 30 minutes behind train 504 East and overtook it at Dix, at which point headlights on both trains had been extinguished by the severity of the storm and common white lanterns installed in their stead; no light could be seen from these headlights by the men in the engine cab.

In due time train 504 proceeded east. No automatic block signal lights could be seen from the engine, nor could the head-end of the engine be seen by the engine men in the cab because of the high velocity of the wind, and the density of the snow. Because of the severity of the storm and difficulty in operating trains by automatic or other signals from this point east they were being operated by what is known as the "block system." That is, applying the system to the trains involved herein, 504 East was sent to Mile Post 426 and 501 kept at Potter until the head-end of 504 East arrived at Mile Post 426 when 501 East was ordered to proceed. Had 504 East been allowed to proceed to Sidney no collision would have occurred. Train 504, however, was not permitted by the dispatcher, who had control of the trains, to proceed but was held there by his orders under the following conditions: The assistant superintendent at Sidney, one Sage, had called a crew to take a train west pulled by engine 510 and the train is known as 510 West. The crew was called to leave at 10 o'clock P. M. of March 13th, but because of the fact that the turn table pit was filled with snow, and other difficulties due to the severity of the storm, this train did not leave Sidney until 1:10 A. M. of March 14th. It arrived at Mile Post 426 at 3:05 A. M., consuming 1 hour and 45 minutes in making the distance between Sidney and Mile Post 426, a distance of between 11 and 12 miles.

The conductor of this train when ordered to take the same out went to the assistant superintendent, explained to him the

difficulty of the situation and asked him to split the train and to send it out with half the number of cars that were in the train; this the superintendent refused to do. The result was that when this train after 1 hour and 55 minutes spent in making a little less than 12 miles arrived at Mile Post 426, the engine was entirely out of water, and was unable to proceed farther with the train; this was before the arrival of 504 East at Mile Post 426. This fact was made known to the dispatcher Borton at Sidney, Nebraska, who issued an order that train 504 East should stop at Mile Post 426, pick up the disabled engine and place it on train 504 East and take it to Sidney for water. Whereupon the conductor of train 510 West reported to the dispatcher the condition of the storm at Mile Post 426, told him the men were unable to see the signals and requested the conductor to permit train 504 East to proceed to Sidney and to allow the following train 501 East to bring the disabled engine. This the dispatcher refused to do. On the arrival of train 504 East at Mile Post 426, the engineer of that train when ordered to pick up disabled engine 510 West, went to the office and requested the dispatcher to permit 504 East to proceed to Sidney without picking up engine 510, thereby keeping out of the way of the following train 501 East, and to permit train 501 East to take the disabled engine to Sidney. This the dispatcher refused to do and peremptorily ordered train 504 to pick up the disabled engine which the crews of 504 East and 510 West proceeded to do. To do this a number of switches had to be cleaned out in order to be thrown, the same having been filled with snow and the snow frozen. At this time the storm was so severe that lanterns were blown out and men had to work at the switches by the light of fusees. A lantern could not be seen more than half a car length, and a fusee not more than a car length. All of the headlights of all of the trains involved had been extinguished by the storm. Much time was necessary to clean the switches and to transfer the disabled engine. When 504 East arrived at Mile Post 426 the dispatcher immediately ordered train 501 East to proceed from Potter

7 miles distant; at Potter the storm was so severe that when train 501 proceeded it did so without its conductor who was left in the depot at Potter. The train left without orders from the conductor. It proceeded until it collided with the rear end of train 504 about 40 car lengths west of Mile Post 426, killing the deceased Cradit who was in the caboose at the time of the collision. The engineer of 501 East testified that he was running very slowly; that he was looking out of his engine; that his headlights threw no light, and that he did not see the caboose of 504 East until he struck it.

We will quote from the transcript some of the testimony with reference to the severity of the storm and operation of trains on that night, the testimony being found in the printed record as indicated after the quotation of the testimony.

FRED G. McMANUS head brakeman on train 504 testified: Employed as brakeman on Union Pacific; on March 13th, 1914, called to leave Cheyenne with train of 40 cars for Sidney, Nebraska (p. 46). Left Cheyenne between 6 and 7 o'clock in the evening; train was Extra 504 East; the engineer was Zalesky and the fireman Cunningham. Charles Cradit was rear brakeman and Ray Phillips conductor; I was braking on the head-end (p. 47). At Dix we put our train on the siding; saw train 501 at Dix (p. 48); we were on siding and they were on the main line side by side (p. 49). It took us about 20 minutes to clean out switch (p. 52). My duties with reference to signals are I am supposed to watch block signals along the track. Did not see them that night, because I could not see them. The storm was too bad; the snow was blowing so that you could not see; the wind blowing hard; it was an awful heavy snow storm (p. 53). It was my duty to tell the dispatcher that I could not see the signals; don't remember telling him that I could not see signals; my duty probably was to tell him; after we left Potter I rode in the engine; next stop was at Mile Post 426; I was back and forth from one side of the engine to the other. I don't remember looking for any signals because I knew it was no use (p. 55). When

we stopped at Mile Post 426 the engine was 6 or 7 cars from the depot. Did not see the signal light at Mile Post 426 until after we stopped (p. 58). I asked operator for orders; saw train Extra 510 West, McConaghy was conductor and Palen was brakeman; the orders were given me to pick up engine 510 West and take it back to Sidney. I gave it to the engineer; he sent word back to the dispatcher that he could not pick the engine up (p. 59). After I told the operator what Engineer Zalesky told me, and the operator talked to the dispatcher, he said he (Zalesky) had to pick up this engine; I told the engineer; he went back to telegraph office (p. 60). I was very near froze to death; it was cold that night (p. 61). First learned 501 had telescoped the caboose when Brakeman McGinnis notified us at the office. I did not see the fire; I did not look; it was storming at that time as bad as ever (p. 62).

JAMES CUNNINGHAM, fireman on Extra 504 East testified: Arrived at Dix about 1:30; the headlight of my engine was out (p. 78). It was froze so I replaced a white lantern as a substitute for the acetylene headlight. I pulled out the reflector and placed the lantern where the burner was, and then pushed the reflector back in again and shut the door; from that point east proceeded with a white lantern for a headlight (p. 79). It was about 7 miles from Potter to Mile Post 426, we were about 22 minutes running those 7 miles. I don't suppose I could see anything ahead of the engine that night; you could not see the lantern that I had for a headlight that night at all (p. 83). When we arrived at Mile Post 426, brakeman told engineer he would have to put engine 510 in our train, and take it to Sidney. The engineer told the brakeman to go back and ask the dispatcher if he would not have Extra 501 pick up this engine 510; the brakeman went back and asked the dispatcher, and the dispatcher told him to pick it up and gave him a clearance also at that time (p. 87).

U. A. BUCKINGHAM, conductor of train 501 East, testified: We overtook train 504 at Dix. I proceeded with my

train to Potter; I was taking orders in the depot and the train pulled out and left me. I supposed it was taking the sidetrack while I was there; I had given no orders for the train to proceed (p. 98).

L. E. MCGINNIS, head brakeman on train 501 East, testified: On March 13th, 1913, went out with train 501 east-bound, Cameron was engineer, Long, fireman, conductor was Buckingham (p. 99). Overtook train 504 East at Dix; the headlight of our engine went out some time that night before we arrived at Kimball. We had an acetylene headlight, a white lantern was placed in the headlight at Kimball; saw engine of train 504 East at Dix (p. 100). I could not see ahead of the engine; I could not see ahead of the engine from the cab; I looked out of the cab several times from Pine Bluffs to Mile Post 426 (p. 102), could not see a lantern that night in that storm from 8 to 10 feet; when we left Potter going down to Mile Post 426 it was snowing and blowing. I stood in the gang way of the engine; could not see the head of the engine, saw no block signals between Potter and Mile Post 426; was trying to see the signals as we went along. The 6 and 7 miles between Potter and Mile Post 426 we were in the neighborhood of 25 minutes going that distance (p. 104). After the collision cars blazed up immediately (p. 106); 8 or 10 minutes after collision I started for Mile Post 426, I could not see the fire at the caboose from the station at Mile Post 426, because of the storm; two cars besides the caboose were smashed up and burning (p. 107). When we left Cheyenne we could see the block signals; we could see them until somewhere around Oliver, in Nebraska, just west of Kimball (p. 108); I had a conversation with the dispatcher over the telephone from Potter, I believe I said something about a heavy storm going on (p. 109); where you cannot see the automatic block signals the rules of the Company require that the train stop, and that a flagman be sent ahead of the train to ascertain the position of the block before proceeding; the engineer determines this (p. 110); on that night under the varying

conditions a fusee might have been seen 50 feet, perhaps not that far, maybe a 100 feet at times.

J. J. McCONAGHY, conductor on train Extra 510 West, testified: I live in Cheyenne, Wyoming; have been conductor on the Union Pacific Railroad nine years on Fourth division between Cheyenne, Wyoming, and Sidney, Nebraska (p. 117); about 10:50 P. M. March 13th, was called to take train from Sidney to Cheyenne, that is, I was called to leave at 10:50; left at 1:10 A. M., delay was caused by storm; turn table pit full of snow; storming very severe; wind blowing at least 35 miles an hour, snowing hard (p. 118); had 42 cars in train. G. D. Sage was assistant superintendent; he has overseeing of all trains in his jurisdiction; owing to the severity of the storm I suggested to split the train and run it in two sections (p. 119); it was an hour before I left. Charles Richardson was engineer, Patrick Fallon was fireman, Henry Dean Palen was head brakeman, Chauncey L. Sweet was rear brakeman, and I was acting as conductor; left Sidney at 1:10 A. M.; arrived at Mile Post 426 3:05 the same morning; considered 11 miles from Sidney to Mile Post 426; train was not stopped; delay caused by weight of train and the severe winds from the northwest; weather conditions very severe; the same as at Sidney, except we did not have the protection we had in the Sidney yards from buildings, hotels and hills (p. 120); when we arrived at Mile Post 426, I proceeded to the head-end of my train I walked backward because of the severity of the storm, I could not face it; went on the south side of the train; wind blowing 35 or 40 miles an hour, snow very thick; could not see a lantern there at that time in the storm over a half car length; when I got to the front end of train, my engineer said he was out of water (p. 121); there was no headlight burning on the engine; I then went to office at Mile Post 426; two operators there. I communicated with the dispatcher through the operators there that night; I told the dispatcher we could not see, the storm was so severe, and to let Extra 504 East go; I asked him to let Extra 501 East pick up my engine 510; dispatcher ordered 504 East to pick up my engine 510 and get out of there

(p. 122); waited for 504 East to arrive; cleaned out switch, went to the switch to clean it out; it was what we call half-cocked, that is not set for either track; if a train had run into the switch in that condition it would have been derailed; we cleaned it out and set the switch; it took us 7 or 8 minutes to clean out the switch; we worked cleaning out the switch without a light; about five minutes after we cleaned out the switch 504 came along (p. 123). I notified Mr. McManus head brakeman on 504 of orders; he proceeded to his engine to deliver the instructions to his engineer. I was in the office at Mile Post 426, at the time the brakeman McManus was in there getting orders; I heard the conversation with the dispatcher being conducted there (p. 124); proceeded to clean the switch again, because it was again full of snow; we were probably eight minutes cleaning the switch; my lantern was sitting to one side, it was out; could see a lantern at that time 8 or 10 feet; we had fusees to work by; I think we burned three, could see a fusee not over a car length; we coupled engine 510 on Extra 504's train (p. 125); while we were cleaning the switch the train ran down; I heard the squeak of the wheels in the snow, and raised up, and the end of the first car was right by me; I could touch it; it had stopped; it was two car lengths away before it ran down; I directed the train to be shoved back; they waited two or three minutes, and the engineer on 510 whistled "Broke in two," the engineer ascertained that the train was broken in two when he coupled in the air; and he could not get air in his gauge in the engine (p. 126); I could not see engine 504 from where I was—about four car lengths—could not see a lantern that distance; did not see the fire that night, the storm was too severe, the storm was equal in severity to any I ever saw there (p. 131).

Rule 504 is as follows:

"When a train is stopped by a block signal it may proceed when the signal is clear. On single track send a flagman in advance immediately. Wait the full time indicated by the special rules on the time table after the flagman has started, and then proceed under control

to the next clear signal; or, if the signal next in advance is in plain view, and the track ahead is seen to be clear, proceed under control not exceeding six miles per hour. On double track a train may proceed after waiting one minute, running under control."

Rule 305 is as follows:

"Fireman as well as enginemen must watch signals closely, as frequently the first view can be had from the fireman's side."

Rule 893 is as follows:

"During foggy or stormy weather do not attempt to recover lost time. Take extraordinary precautions both at switches and at all places where authority to proceed depends upon signals." (P. 133.)

Rule 106 is as follows:

"In all cases of doubt or uncertainty, the safe course must be taken and no risks run."

Rule 304 is as follows:

"In foggy or stormy weather enginemen must approach both distance and home signals with great care and have their trains under control."

The definition of the train under control as shown by the book of rules is "Under Control. To be able to stop within the distance track is seen to be clear." It took me about 35 minutes to go from the rear end of my train to the front end, because of the storm. When I was cleaning the switch I had a fusee for light (p. 134). In the conversation with Mr. Sage about splitting the train I told him in the severity of the storm the engine could not pull the train to Potter for water (p. 140); had a second conversation, I argued that we couldn't make Potter for water in the storm (p. 142). He would not split the train for me (p. 143). It is a part of the duty of the conductor to observe the block signals. He might see where the engineer might accidentally overlook one; I could not tell that night; we afterwards learned that engine on train 501 had run into the caboose of train 504, and learned persons had

been injured or killed in that collision, I did not go back to the wreckage (p. 153).

SWAN DEDRICK testified: Live in Sidney, am proprietor of the Metropolitan Hotel, right across from the depot, I was up in the hotel at Sidney about 4 o'clock in the morning and observed the weather (p. 166). During the thirty years I have resided in Cheyenne County this was as bad a storm as ever I saw. I have seen storms that lasted longer than this, but not so severe. We call them blizzards; I was up all night (p. 168).

HERBERT W. CAMERON, engineer on train 501, testified for the defendant: Conductor Phillips and Brakeman Cradit came on my engine, I says: "It is pretty hard to see these block signals. Will you do a good job of flagging tonight and use lots of fusees all the way down?" I says, "I will be glad to stop for them until they burn out." Cradit was present at that time (p. 188). At time of collision I had two white lights, one on each side of the engine, and a headlight (lantern); did not see all the block signals (p. 190). The rules of the Company are to protect the rear end of the train at all times (p. 192); the rules of the Company are to do a good job of flagging at all times; I was just simply asking them (Phillips and Cradit) to comply with the rules of the Company; putting expression on it (p. 193). I had a lantern in the headlight that night; my regular acetylene headlight went out at Pine Bluffs, I guess it was froze (p. 195). I was discharged for running block signals under rule 508 (p. 200).

WALLACE LYNCH testified for defendant as follows: Was in the caboose on train 504 East when same was struck (p. 210); Phillips and Cradit were there. I remember the stop, it was a long stop, about 15 minutes I should judge—maybe longer (p. 211). Brakeman Cradit got out of the caboose immediately on our stopping there; went out the front door, he was out a short time, probably a couple of minutes; he told Phillips he did not learn anything, he said he was looking for a side track but could not see any; he went out a second time;

was out probably two minutes (p. 212); Phillips asked him "what did he learn this time," and he said "not anything more than I did before, I think they are spacing them, but I could not tell" (p. 213). I don't know what he did when he went out, it was when he came in the second time that he said "he thought they were spacing them" (p. 215).

JOHN FARRELL, stockman riding in caboose testified for defendant: Cradit passed my head going out of the front door, he was gone a couple of minutes; second time he went out I was awake; Phillips says to him "take the south side of the train" he was gone that time about five minutes; when he came back he said "he could not find out anything"; none of us knew where we were at; they (Phillips and Cradit) were trying to find out where they were and wondered why they were stopped there, and what the station was, and what the stop was (p. 220).

V. A. WIRT, chief train dispatcher for the Union Pacific testified: Trains were being spaced that night by the train dispatcher between Sidney and Cheyenne. We were spacing 501 and 504 by holding 501 at Potter until 504 had arrived at Mile Post 426 (p. 228). We let 501 leave Potter before 504 passed Mile Post 426 that is before 504 got by 426, and the collision occurred, it is evident since the collision occurred that it would have been better to have let train 504 get past Mile Post 426 before we let 501 out of Potter; we got a request that night to let the following train (501) pick up the engine (510), it was through the operator on duty at Mile Post 426 (p. 229). I refused the request for good and sufficient reasons. Our instructions are to space trains during stormy or foggy weather (p. 232).

W. A. BORTON, train dispatcher on duty that night testified as follows: Have been engaged in railroad business 22 years; on the night of March 13th and 14th I was train dispatcher at Sidney, Nebraska, remained on duty until 8 o'clock the following morning (p. 236). I issued order for train 504 to pick up engine 510; was advised that engine 510 was out

of water and to bring engine 510 to Sidney (p. 237). I gave the order for train 501 to leave Potter after 504 had arrived at Mile Post 426; I gave them an order reading "Extra 501 East will meet Extra 510 West on double track between Sidney and Mile Post 426" (p. 238). I did not know that they were having any difficulty seeing signals that night; it never occurred to me; I knew it was storming; knew it was a bad storm; did not know that it is difficult to see signals in a bad storm; have been railroad man 22 years; the dispatcher has control of the trains (p. 239). It is not his duty to ascertain whether the signals can be seen or not; it is the duty of the train dispatcher to always take the safe course; and where there was any question as to whether the enginemen could see the signals or not, the dispatcher should take the safe course, and dispatch his trains accordingly; they (trainmen and enginemen) did not say anything about it; agents along the line reported it was storming, snowing, and blowing and drifting; I made no inquiry as to whether trainmen could see signals (p. 240); there was one person requested me to let 501 pick up engine 510, that was the operator at Mile Post 426; he said the engineer Zalesky requested him; Brakeman McManus asked me through the operator to let 501 pick up 510; the operator was the only one that I talked to; the second time there was any question about picking the engine up I turned the matter over to the chief operator, and had nothing more to do with it; I was using the telephone and telegraph both that night, and I let him settle it after the first request, which was the request of Brakeman McManus; after that I turned it over to the chief dispatcher (p. 241). I turned the matter over to the chief dispatcher the second time they began to talk about it; I knew when I let 501 leave Potter that it was possible for them to overtake 504 at Mile Post 426 (p. 242).

II.

The supreme court of the state of Nebraska was unanimous in holding that the proofs admitted were sufficient to require submission of the issues to the jury. This court has re-

peatedly announced that it will not disturb a unanimous decision on the sufficiency of the evidence "unless error is palpable."

In the case at bar a number of the grounds of alleged error are, that the trial court erred in submitting the case to the jury and that he committed error in overruling various instructions of the defendant below to require the jury to return a verdict for the defendant.

The rule was announced by Mr. Justice Hughes in *Great Northern Co. v. Knapp*, 240 U. S. 464, as follows:

"The defendant (plaintiff in error) requested a peremptory instruction in its favor, on the ground that there was not sufficient evidence to entitle the plaintiff to recover. The appellate court was unanimous in holding that the trial court had properly left the case to the jury. No clear and palpable error is shown which would justify us in disturbing that ruling."

In *Seaboard Air Line Railway Co. v. Lorick*, 243 U. S. 572, the rule is announced as expressed in the syllabus:

"A unanimous ruling of the highest court of a state that the trial court had properly left to the jury a case brought under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Sec. 8657), will not be disturbed by the Federal Supreme Court on writ of error unless clear and palpable error is shown."

In the case of *Baltimore & Ohio Railroad Company v. Whitacre*, 242 U. S. 169, the rule is announced in the syllabus as follows:

"Only in case of clear and palpable error will a unanimous ruling of the highest state court that the trial court had properly left to the jury a suit under the Employers' Liability Act of April 22, 1908, (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Sec. 8657) be disturbed by the Federal Supreme court on writ of error."

We think that it cannot be contended that in this case any palpable error was committed by the trial court in that

particular. On the other hand we think that the negligence of the Company conspicuously appeared.

III.

The defendant Railway Company was negligent in the following particulars:

First: The engineer on 501 East, running by the block signals and colliding with the rear of train 504 East.

Second: The negligence of the train dispatcher in refusing to permit train 504 East to proceed to Sidney and to allow 501 East to take up engine 510 West.

Third: The act of the train dispatcher in ordering train 501 East to leave Potter before train 504 East had cleared Mile Post 426.

Fourth: The negligence of the trainmaster in sending train 510 West out from Sidney so heavily laden that it took it one hour and fifty-five minutes to go 11 miles against the storm and causing the engine to become out of water, when it reached Mile Post 426, thereby blocking and interfering with operation of trains on the road the night in question.

There are other acts of negligence of the Railroad Company unnecessary to be referred to here, but which clearly required the submission of this case to the jury.

There would seem to be no ground to question the Railway Company's negligence in these particulars, all of which contributed to the accident in question. It is beyond contradiction that if any one of these acts had not been committed by the Railway Company this accident would not have occurred.

Plaintiff in error complains in its brief that the court submitted, as one of the acts of negligence, the fact that train 501 was operating from Potter to Mile Post 426 without a conductor. In this counsel is not accurate. The court in instruction No. 1 stated the allegations in the petition, and the court stated the issues with reference to train 501 as follows:

"That in taking the train Extra 501 East from Potter to Mile Post 426 the defendant carelessly and negligently proceeded without the conductor of the train. That by so carelessly running said train Extra 501 without a conductor, without a head light, and without observing the signals, carelessly and negligently ran into the rear of train Extra 504, destroying and demolishing the caboose attached to said train, and thereby causing the death of the said Charles M. Cradit, who was in said caboose at the time of said collision."

This charge is not as contended by counsel in his brief, but the court correctly states the conditions under which train No. 501 was operated the night in question and submitted all taken together as one of the allegations of negligence in the petition.

Section 5992 of the statutes of the state of Nebraska is as follows:

"It shall be unlawful for any railroad doing business in Nebraska to operate or run over its road or any part thereof, or to suffer or permit to be operated or run over its road or any part thereof, outside of yard limits any freight train which is not manned with a crew consisting of one engineer, one fireman, one conductor and two brakeman."

It is conceded that the train is controlled by the engineer and conductor, who are both equally responsible for its safe operation. It is true that the conductor, on the night in question, could not see the signals ahead of the engine, but he could see whether the block signals were visible from the caboose, and if he found they were not visible, and that the engineer was running by the block signals he could stop the train and require the engineer to proceed by a flag as provided by the rules.

It is conceded that Engineer Cameron ran by the red block signals, and that he was discharged from the Company's service. Therefore it cannot be contended that this act of the engineer was not negligence.

It is likewise contended that there is no actionable negligence chargeable to the Company, because Assistant Superintendent Sage sent out train 510 West so heavily laden that it took 1 hour and 45 minutes to run a distance of 11 miles to Mile Post 426, and exhaust a tank of water in going that distance.

It must be conceded that had not train 510 West been sent out that night then this accident would not have occurred. It must also be conceded that Conductor McConaghy on train 510 West went to the assistant superintendent and asked him to split the train, because the storm was so severe that it could not make Potter for water. This was not denied by the assistant superintendent and stands uncontradicted, but it is said that this accident could not have been foreseen by Assistant Superintendent Sage as one of the results of this act, if the same were negligent. To this we say that there were a number of trains on the road that night in the blizzard. One of the things to be anticipated in operating trains in a blizzard is, that because of poor visibility, collisions are liable to occur. This is more probable when trains are so heavily loaded that they cannot get over the road. And one of the things which certainly would occur to an experienced railroad man would be, that if this train was so heavily laden, that it could not get over the road, and would stall, as it did stall, by that much he increased the possibilities of collision. This was evident to Conductor McConaghy when he requested the train to be split, and it was clearly negligence on the part of the assistant superintendent when his attention was called to the fact, not to do so.

The negligence of the train dispatchers Wirt and Borton is conspicuous, and stands out unchallenged. Conductor McConaghy went to the telephone and notified the train dispatcher that the blizzard was so bad that trainmen could not see the signals and requested that train 504 be permitted to proceed to Sidney, and that train 501 be ordered to pick up engine 510. This was refused. When train 504 arrived, the engineer of

that train requested the dispatcher to be permitted to go to Sidney, and to let train 501 pick up engine 510, he again refused, but peremptorily ordered 504 to pick up engine 510, and immediately ordered train 501 to proceed from Potter about seven miles distant. This was the clearest negligence. If the dispatcher insisted that train 504 should pick up engine 510 then he should have held train 501 at Potter, until train 504 had picked up engine 510, and had cleared station Mile Post 426.

The undisputed evidence in this case is that on the night of March 13th, 1913, the trains involved in this accident were run blindly, the condition of the storm being such as to preclude the men from ascertaining whether they were running into anything or not.

Under such circumstances methods of operation commonly employed are evidence on the issues of negligence, but are not conclusive. An obviously dangerous practice cannot be justified by custom or usage. What ought to be done, under the circumstances, is fixed by the standard of reasonable prudence, without regard as to whether or not the usual practice meets that standard.

The issues of negligence in such cases are exclusively for the jury, which may consider at the same time the aspect of the proofs of common methods, and also the aspect that the practice actually pursued was inherently dangerous.

Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. Ed. 605.

Texas P. R. Co. v. Behmyer, 189 U. S. 468.

Fletcher v. Baltimore & P. R. Co., 168 U. S. 135.

Parker v. Cushman, 195 Fed. 715.

American Car & Foundry Co. v. Uss, 211 Fed. 862.

Sherman & Redfield, Negligence, (6th Ed.) Sec. 12a.

In conditions which prevent employees from seeing an approaching train, or which prevent usual signals from attracting their attention, the Railroad Company should employ

such other adequate means as are necessary to bring to an employee's knowledge those movements that imperil his life. In any event the circumstances that the employees could not see, and that the storm rendered it unlikely that ordinary warning signals would attract their notice made issues of negligence a question of fact for the jury.

Concurrent acts of negligence and acts which contributed to the accident are admissible in evidence and proper to be considered by the jury as well as facts showing approximate cause.

Sandidge v. Atchison, T. & S. F. Ry. Co., 193 Fed. 867.

American Car & Foundry Co. v. Uss, 211 Fed. 868.

Northern Pacific R. Co. v. Mix, 121 Fed. 476.

The Circuit Court of Appeals of the 9th Circuit in *Sandidge v. Atchison, T. & S. F. Ry. Co.*, *supra*, held:

"Furthermore, the negligence of the train dispatcher need not have been the sole and only cause of the accident to charge the defendant with negligence. If his negligence contributed to the accident, that is to say, if his action had a share in bringing about the disaster—the defendant will be liable."

In *Northern Pacific R. Co. v. Mix*, *supra*, the Circuit Court of Appeals of the 9th Circuit sustained the following instruction:

"If accordingly, you find from the evidence that the failure of the operatives on train 162 East to receive notice of the approach of 159 West was due wholly or in part to any negligence on the part of the train dispatcher, then the defendant Company was negligent and your verdict should be for the plaintiff. It is not necessary, in order that the plaintiff may recover, that the negligence of the train dispatcher should be the sole cause of the collision; if his negligence contributed to—that is to say, had a share in producing—the injury the company was liable, even though the negligence of the telegraph operator at Bonita also contributed to the collision."

In *American Car & Foundry Co. v. Uss, supra*, the Circuit Court of Appeals of the 8th Circuit laid down the rule as follows:

"The third instruction asked that if Koza put two standards in place of five, and that this caused the accident, plaintiff could not recover. This instruction ignored the fact that there may be several co-operating causes of an accident, and it did not limit its effect to a case where the negligence of Koza was the sole cause of the injury. If Koza negligently put up two standards, and should have put up five, and this caused the accident in concurrence with the defendant's negligence in the turntable, and but for the negligence of both the accident could not have happened, all of the elements of the instruction would be present, and yet plaintiff could recover."

Where there are several causes which are either dependent or independent of each other all of which contribute to the injury an action may in a proper case be based upon all or any one of these causes.

Louisville E. & St. Louis Ry. Co. v. Hicks, (Ind.) 37 N. E. 43.

Pacific Telephone & Telegraph Company v. Hoffman, 208 Fed. 225.

Burk v. Creamery Package Mfg. Co., (Ia.) 102 N. W. 793.

Milwaukee, St. Paul R. R. Co. v. Kellogg, 94 U. S. 469.

The question of proximate cause does not arise in an action for personal injury occasioned by an accident resulting from two or more causes, for all of which the defendant is responsible.

Williams v. Chg. B. & Q. Ry. Co., 155 S. W. 64 (Mo.).

Logan v. Railway Company, 182 S. W. 126 (Mo.).
1 *Thompson on Negligence*, Sec. 69.

In *Pacific Telephone & Telegraph Company v. Hoffman*, *supra*, it is said:

"There is also another well-established rule not to be overlooked in this connection, and that is that, if concurring or successive acts of negligence of numerous persons combined together caused the plaintiff's injury, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. (Supplement to Thompson's Law of Negligence, by White par. 75.) We think that, with respect to this feature of the case, the evidence that the guy wire was one of the proximate causes of the accident was sufficient to go to the jury."

In *Milwaukee & St. Paul Ry. Co. v. Kellogg*, *supra*, it is said:

"In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the obvious province of a jury to look at this succession of events of facts and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are discovered by new or independent agencies, and this must be determined in view of the circumstances existing at the time."

In *Louisville E. & St. L. Co. v. Hicks*, *supra*, it is said:

"Where there are several causes which are either dependent or independent, of each other, all of which contributed to the injury an action may in a proper case, be based upon all, or any one, of the causes."

In *Burke v. Creamery Package Mfg. Co.*, *supra*, it is said:

"Where several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have occurred it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened."

IV.

The negligence of Cradit in failing to flag the rear of his train under the circumstances in which he was placed was not such as to preclude a comparison of negligence, and did not prevent plaintiff's recovery in this action.

Failure to observe a rule does not constitute contributory negligence on the part of the employee where the observance of the rule would not have prevented the accident.

Ill. Cent. R. Co. v. Stewart, 223 Fed. 30.

Poplar v. Minneapolis, St. P. & S. S. M. Ry. Co., 141 N. W. 798.

In the case of *Illinois Cent. R. Co. v. Stewart*, *supra*, the Circuit Court of Appeals of the 8th Circuit held that a car repairer was not guilty of contributory negligence where he failed to display a blue light to the rear of the car on which he was working as provided by the rules, when the car that struck him was moved by gravity, and came down and collided with the car on which he was working and injured him.

The rule has been stated as follows:

"It has often been held in this court that ordinarily negligence or contributory negligence is not a question of law, but of fact, to be settled by the finding of the jury. Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony, or, because, the facts being undisputed, fair-minded men might honestly draw different conclusions therefrom, the question is not one of law."

In *Texas Pacific Ry. Co. v. Harvey*, 228 U. S. 319, held:

"The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

In *Gardner v. Michigan Central R. R. Co.*, 150 U. S. 349, held:

"The question of contributory negligence becomes one of law only when fair-minded men, from the established or conceded facts, would draw the conclusion of a want of ordinary care. Where opposing inferences may be drawn, the question of negligence, under proper instructions, must be submitted to the jury."

Shatto v. Erie R. Co., 121 Fed. 678, 59 C. C. A. 1.
New York S. & W. R. Co. v. Thierer, 221 Fed. 571.

To determine the question of his alleged negligence we must consider the circumstances that surrounded him as given by the witnesses on his behalf.

On the night in question the wind was blowing a gale. The velocity of the wind and severity of the storm had extinguished the head lights on all of the trains involved in the accident. The deceased knew that the headlight on 501 and 504 East had been extinguished.

A lantern could be seen in the storm but ten or fifteen feet.

A fusee could be seen but a car length.

Both the head brakeman and engineer on train 501 East were looking out of the engine cab at the time of the collision and could not see the lights on the caboose of 504, or the lights in the car through the windows, and did not see train 504 before the accident and the impact of the collision was the first knowledge they received that they were in the vicinity of train 504 East. One of the men testified that at the time of the collision he did not see train 504, but thought that his engine had left the track. It must be further taken into consideration that these men on engine 501 were moving east, had the storm in their back, and that the storm was not blowing into their faces.

The engineer and head brakeman on 501 East testified that the lantern in their head light gave no light, and that they

could not see any light ahead of their engine; when 504 East stopped deceased did not know the head end of his train had arrived at Mile Post 426, and no one in the caboose swore that they heard the engineer whistle out a flagman. Deceased knew the trains were operated in the storm by being blocked, hence he supposed train 501 that was following him would remain at Potter until his train left Mile Post 426.

Had deceased gone out in the storm to flag train 501, he would have been traveling west with the storm in his face against which he could not see. The evidence is conclusive in this case that no one could walk and see against that storm, and some of the witnesses swore it was impossible to walk against the storm for any distance.

The wind was blowing such a gale that it was impossible to hear the noise of an approaching train above the roar of the gale. In going back to flag train 501 he would from necessity be compelled to walk in the center of the track, and had he met the train would have certainly been run down and killed.

He could not see the lights on and in his own caboose more than 10 or 15 feet distant. He could not hear the whistle from the front end of the train. Had he got out of sight of his own train, and the train had moved on, he would not have known that fact, and would have been left on the prairie to perish in the storm.

There were nine men at Mile Post 426 at the head end of train 504 when the collision occurred. A vigorous young man succeeded in going to the head end by traveling on the south side of the train, and he informed these men that the collision had occurred; that the caboose was demolished and on fire; that their fellow workmen and passengers were caught in the wreck; and yet not one of these sturdy vigorous men accustomed to out-door work in severe storms, had the hardihood to even attempt to go to the west end of the train against

the storm to rescue their fellow workmen and passengers, or to give aid to the injured. Under these circumstances will all fair-minded men draw the same conclusions and say the deceased was clearly negligent? The conductor of train 504, whose name was Phillips was also killed in this accident in the caboose with the deceased. His case was tried at the next succeeding term after the trial of the case at bar. The testimony in the Phillips case was the testimony in this case, which was read from the record in this case to the jury in that case, and when the court instructed the jury in the Phillips case he submitted the question of the contributory negligence of Phillips to the jury. In this he was unanimously sustained by the supreme court of the State of Nebraska (*Phillips v. U. P. R. R. Co.*, 100 Neb. 157). When these men who are familiar with the legal principles which govern these questions change their minds in this manner as to the contributory negligence of the deceased, can it not be said for the jury that they considered the negligence of Cradit negligible and not such as to require any substantial diminution of the verdict.

Plaintiff in error relies in his contention in this regard on *Great Northern Ry. v. Wiles*, 240 U. S. 444. The circumstances in that case and the case at bar are so dissimilar that the Wiles case cannot be authority in this. In the Wiles case there was absolutely no negligence proven on behalf of the Company. A freight train was stopped on the track when it broke in two by the draw-bar pulling out of the sixth car from the engine. It was not shown what caused the pulling out of the draw-bar "nor was there proof that it was defective, or that the Company was negligent in the care or use of it." On the other hand on the part of the deceased brakeman who was killed there were no facts which excused him from flagging the rear of his train; there was no storm prevailing, and in that case the evidence showed no negligence whatever on the part of the Railway Company, and palpable negligence on behalf of the deceased brakeman.

In the case at bar the negligence of the Railway Company is beyond question, and it can be said for deceased, there were circumstances surrounding the situation that extenuated his acts if they did not entirely justify them.

V.

The jury was properly instructed on the assumption of risk.

The trial court instructed the jury on the assumption of risk as follows:

"As one of its defenses the defendant pleads what is known and called assumption of risk. You are instructed as a matter of law that a servant or employee assumes the ordinary risks and dangers incident and peculiar to the employment upon which he enters but he does not assume any risk or dangers, due to the master's or employer's negligence nor does he assume risks or dangers arising from sudden unforeseen circumstances, not ordinarily incident to his employment."

The answer of the defendant below pleaded the assumption of risk in the 11th paragraph of said answer in the following language:

"Further answering said petition, this defendant alleges that the injuries to, and death of, the said Charles M. Cradit were due solely and exclusively to his own carelessness and negligence and not to any carelessness or negligence upon the part of this defendant and were due solely and exclusively to dangers and risks which were open, apparent and known to the said Charles M. Cradit, were incident to his employment and assumed by him."

It will thus be seen that the risks which the deceased was alleged to have assumed in the answer of the defendant Railway Company were the ordinary risks and it was alleged in the answer that they were incident to his employment and assumed by him.

It is insisted in the brief of plaintiff-in-error that he assumed the risk of the negligence of his fellow servant.

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Risks arising from the employer's negligence are not ordinary, but extraordinary risks.

Chic. R. I. & P. R. Company v. McCarty, 49 Neb. 475.

Grimm v. Omaha Electric Light & Power Co., 79 Neb. 387.

Tarnoski v. Cudahy Packing Co., 85 Neb. 151.

Illinois Central Ry. v. Egan, 203 Fed. 937.

Chesapeake & O. R. Co. v. De-Atley, 241 U. S. 310, 50 L. Ed. 1016.

Chapman v. United States Express Co., (Mich.) 159 N. W. 308.

If the assumption of a risk, not ordinarily and necessarily incident to the employment, is relied on as a defense in an action for personal injuries, the same must be specially pleaded in the courts of Nebraska.

Evans Laundry Co. v. Crawford, 67 Neb. 153.

Maron v. Case Threshing Machine Co., 81 Neb. 546.

Tarnoski v. Cudahy Packing Co., 85 Neb. 151.

Flick v. Globe Mfg. Co., (Iowa) 154 N. W. 928.

Lloyd v. South R. Y. Co., (Ala.) 81 So. 103.

Oswald v. Donahue, 102 N. E. 925.

Konig v. Nevada and Cal. etc., 135 Pac. 141.

Louisville & Northern R. Co. v. Butler, (Ala.) 55 Southern 262.

Duffey v. Consolidated Coal Co., (Iowa) 124 N. W. 609.

Vons v. Shorthill Co., (Iowa), 107 N. W. 417.

Martin v. Des Moines, Edison L. Co., (Iowa) 106 N. W. 359.

International & G. N. R. Co. v. Garcia, 117 S. W. 206.

Phillips v. Union Pacific R. R. Co., (Neb.) 100 Nebr. 157.

The last case above cited is the opinion of the supreme court of Nebraska in the case of *Phillips Adm. v. Union Pa-*

cific *R. R. Co.* Phillips was Cradit's conductor and was killed in the same collision. The assumption of the risk was pleaded in that case the same as in this, and in the Phillips case the supreme court of Nebraska says:

"The defense that plaintiff assumed the risk of defendant's negligence should have been specially pleaded."

In *Evans Laundry Company v. Crawford*, *supra*, the supreme court of Nebraska announced the rule in that state in the 4th paragraph of the syllabus as follows:

"Assumption of risk as a defense must be specially pleaded. Where the assumption of a risk not usually and ordinarily incident to employment is relied on as a defense in an action against the master for negligence, such assumption of risk must be specially pleaded."

We therefore see that in a long line of decisions in the state of Nebraska, it has been uniformly held that the risks arising from the employer's negligence or the fellow servant's negligence are not ordinary, but extra-ordinary risks, and that when the defense, that the deceased assumed the risks of defendant's negligence, is relied on, that fact should be specially pleaded.

In this case therefore we see that the court instructed the jury that the deceased "assumes the ordinary risks and dangers incident and peculiar to the employment upon which he enters." This is the risk that the defendant in its answer pleaded the deceased assumed. If the defendant below relied as a defense that the deceased assumed the risk of the Railway Company's negligence it should have specially pleaded the same.

The ground upon which the Railway Company asserts that Cradit assumed the risk of the dangers which caused his death grows out of an alleged conversation that was held on the engine of Extra 501, between the engineer and fireman on the train and Conductor Phillips on Extra 504. This conversation in the language of the engineer is as follows:

"I says, 'It is pretty hard to see the block signals, will you do a good job of flagging to-night, and use lots of fusees all the way down.' I says, 'I will be glad to stop for them until they burn out'" (Record, p. 188).

On cross examination he (Cameron) testified:

"The rules of the Company are to protect the rear end of the train at all times."

Q. "And you were just simply asking them to comply with the rules of the Company?"

A. "Yes, sir, putting expression into it" (Record, p. 193).

This conversation between Cameron and Phillips was likewise testified to by Long, the fireman on Extra 501, and it is true they also testified that Cradit was present at the time. In this they were contradicted by the witness Farrell, who testified that Cradit came back to the caboose on Extra 504 at Dix, the place where this conversation was alleged to have occurred, before 501 arrived, and that he did not leave the caboose thereafter at that point (p. 31). In this he is corroborated by the witness McGinnis, head brakeman on 501, and McManus, head brakeman on 504. McGinnis was at the engine 501 nearly all of the time it was there, and he testified that Cradit was not there during that time, but that Phillips was.

On this testimony the court, at the request of the Railway Company, submitted to the jury a special interrogatory as to whether or not Cradit was present at the conversation that occurred between Cameron and Long on the one hand and Phillips on the other. To this the jury answered that he was not present.

It is the rule in the state of Nebraska that where a special interrogatory is submitted to the jury at the request of one of the litigants and the special interrogatory is answered by the jury contrary to the contentions of the parties submitting the same, that party is estopped to thereafter assert that

there was no testimony upon which to base such answer to such interrogatory for the reason that no party has a right to have a special interrogatory submitted unless there is testimony for the jury to weigh in answering the interrogatory.

In *Farmers Bank of Nebraska City, et al. v. Alexander, Garrott, et al.*, 63 Nebr. 64, it was held:

"Where a question is submitted to the jury by the court, after the request of a party for its submission, such party will not be heard to say that a finding thereon adverse to him is not sustained by sufficient evidence."

In *American Fire Insurance Company of Philadelphia v. Harvey Landfare, et al.*, 56 Nebr. 482, the rule is laid down as follows:

"One who tenders an instruction which is given, which assumes the existence of evidence to establish an issuable fact in the case, cannot afterwards be heard to assert that there was no evidence received tending to prove such fact."

VI.

The trial court did not err in reducing the amount of the verdict in an amount sufficient to cover what the jury should have deducted for deceased's contributory negligence.

When Congress passed the Employer's Liability Act and gave to the state courts concurrent jurisdiction with the federal courts in its administration, Congress must have intended that when the law was administered and enforced by the state courts that it would be administered under the state rules, codes and practice.

It has always been the practice in the courts of the state of Nebraska, in personal injury cases, and other cases *ex delicto*, where there is no error in the record and the court could determine that the excessive verdict was not the result of passion and prejudice on the part of the jury to require a remittitur or grant a new trial.

In doing this the court does not usurp the functions of the jury for the reason that the jury has found under the evidence and the instructions of the court that the plaintiff is entitled to recover. The amount of the recovery is determined by the age of the deceased, his earning capacity, his habits and from other facts that are before the court.

In the exercise of this duty the courts are careful to require such a remittitur as will clearly come within what the plaintiff is entitled to recover. If the plaintiff desires to accept the conditions and file a remittitur he can do so, if not he can refuse and a new trial is granted. The defendant is protected in his rights by the court in requiring a remittitur of such an amount as will bring the verdict clearly within what the plaintiff is entitled to recover under the evidence. This is only the practice in cases where there is no error in the record except the excessive verdict.

The rule in the state of Nebraska is clearly set forth in the case of the *Chicago, Burlington & Quincy R. R. Co. v. Leo Krayenbuhl*, 70 Neb. 766, and we quote from this opinion quite extensively as showing beyond controversy the rule in this state:

"It is finally urged that the verdict of the jury awarding plaintiff \$18,000.00 damages is so excessive as to suggest that it was the result of passion and prejudice, and for this reason the verdict should have been set aside by the trial judge instead of having it reduced by a remittitur. When the verdict of the jury was returned the court in disposing of defendant's motion for a new trial directed a remittitur of \$6,000.00 from the amount found by the jury, and on a remittitur being entered, judgment was rendered against the defendant for \$12,000.00 and it is urged that the judgment even after the remittitur, is still so clearly excessive that a new trial should be granted. No authority, however, is cited to sustain this contention. In fact the rule seems to be so well settled in this state that where an actual and substantial damage is proved in an action for personal injuries and the amount of the verdict of the jury appears to be excessive, a remittitur

may be directed either in the district court or in this court on error proceedings, that a search for authorities in this state to sustain defendant's position would be a fruitless one.

"The rule of curing an excessive judgment for damages where actual damages have been proved by reversing the judgment unless a remittitur be entered has the approval of courts of last resort in nearly every state in this union, and in none is the rule more firmly established than in the decisions of our own court. The rule in this state is well set forth in the language of Sullivan, J., in delivering the opinion in *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713, when he says:

"It is the settled doctrine of this court, even in actions *ex delicto*, that a judgment based on a verdict which is excessive but which was not given under the influence of passion or prejudice, will be permitted to stand on condition that the excess be remitted."

"In the case just quoted from, a remittitur of \$3,000.00 was directed on a judgment rendered for \$7,000.00 or almost half the judgment was directed to be remitted. In *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638, the verdict of the jury awarded \$10,000 damages; the trial court reduced this verdict to \$6,300, and this court directed a further remittitur of \$1,300, but refused to set aside the judgment as excessive, if the remittitur was entered. In *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb. 159, the verdict of the jury was for \$5,000.00 damages; the trial judge compelled a remittitur of \$2,350.00 of the verdict awarded, and this court directed a further remittitur of \$1,450, leaving a judgment of \$1,200.00 or less than one-fourth of the amount awarded by the verdict of the jury. In the still more recent case of *Swift & Co. v. Holoubek*, 62 Neb. 31, on rehearing a judgment for \$11,500 awarded plaintiff for the loss of his hand was by order of this court reduced by a remittitur to \$7,500. There is a certain similarity in the nature of the injury in the Holoubek case and the case at bar; the difference being that one injury was for the loss of a hand and the other for the loss of a foot. In the one case the plaintiff had a less expectancy of life, but was shown to have been a day laborer capable of earning \$1.25 a day; in the

instant case the plaintiff is an infant and might be capable of following any avocation or profession in life. Each of these cases was twice tried to a jury and in each the verdict in the first instance was for \$5,000.00. In the Holoubek case on a retrial the first verdict was increased to \$11,500 and in the instant case, as already stated, in the retrial the jury awarded \$18,000, which was reduced by the trial court to \$12,000. We readily can see that there is no fast and loose rule to establish a monetary value of the injury received in either of these cases; but this thing is certain, that the loss of a foot by a healthy four-year-old child with an expectancy of 51 years of life is a serious injury which should be responded to in substantial damage from the party whose negligence inflicted it. But as punitive and exemplary damages are not allowed in this state, we are impressed with the idea that, as compared with judgments approved by this court in cases of partial similarity, the judgment for \$12,000 under all the facts and circumstances surrounding the injury is somewhat excessive, and in view of the holding of this court in *Swift & Co. v. Holoubek*, *supra*, we think that a further remittitur of \$3,000.00 should be entered by plaintiff within 30 days and that if such remittitur be entered the judgment of the district court for \$9,000 as of the date thereof should be affirmed; otherwise the judgment be reversed and the cause remanded for further proceedings.

"It is therefore recommended that, if plaintiff enter a remittitur of \$3,000 within 30 days, the judgment of the district court be affirmed; otherwise, the judgment be reversed and the cause remanded for further proceedings."

In the case at bar the district court authorized a remittitur of \$10,000 and the supreme court an additional remittitur of \$1500.00.

The exact question raised by plaintiff in error in this case has been passed on by the Circuit Court of Appeals of the 6th circuit in two cases, the first being the case of *Yazoo M. V. R. Co. v. Wright*, 207 Fed. 281. In this case a verdict was returned for \$19,000.00. The jury deducted nothing for

the contributory negligence of the deceased. On the hearing of the motion for new trial it was found that the deceased was guilty of contributory negligence and the trial court required a remittitur of \$9000.00 to cover what the jury should have deducted for the deceased's contributory negligence. In the opinion the Circuit Court of Appeals held:

"It is true that on motion for a new trial upon which the court was required to weigh the evidence it was found that the engineer was guilty of contributory negligence, and hence the verdict was reduced—in a form of a remittitur, which was accepted in the sum of \$9,000 as before stated * * * We see no error in any of these respects of which the railroad company can rightfully complain."

This case was taken to the supreme court of the United States, and affirmed in *Yazoo & M. V. R. Co. v. Wright*, 235 U. S. 375. This point, however, is not discussed in the opinion.

This question came again before the Circuit Court of Appeals in a most peculiar manner. The deceased's negligence was conceded, and the jury made no deduction for the same. There were no specifications of error which raised this question, and in the case of *Pennsylvania Co. v. Sheeley*, 221 Fed. 901, in the opinion the court says:

"However, there is one matter which must be considered plain error so that it is our duty under rule eleven to notice it without sufficient exception or assignment. The case was tried some months before the supreme court in *Norfolk Co. v. Earnest*, 229 U. S. 114, 122, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914 C. 172, had formulated the rule of damages in cases of contributory negligence, and while the rule as given by the court below to the jury was in some respects more favorable to the defendant than it should have been, yet, upon the subject of proportioning damages, it can at least be said that the jury could not well have understood the rule to be as the supreme court has said it is, and it seems probable that the jury did not make allowance for contributory negligence as the statute requires. There must, therefore, be

another trial unless this error can be cured by a remittitur.

"In making to plaintiff an offer of conditions upon which part of a judgment may stand, we cannot take the place of a jury. We must only be sure that no substantial injustice comes to the party against whom the judgment is maintained. If the conditions so fixed seem unjust to the plaintiff, he can protect himself by declining to accept the offer. The utmost which defendant in this case can claim is that the jury made no allowance on account of Sheeley's conduct, and so that the \$6,500 represents the total damages. The negligence of the engineer being established according to the theory of the petition, we think there would be no fair room to say that Sheeley's negligence should be considered as more than one-half as much as the engineer's or more than one-third of the whole. It follows that if plaintiff desires to accept a judgment for two-thirds of the amount found below, and within 30 days files evidence of that acceptance in accordance with our practice, the judgment will be affirmed; otherwise, it will be reversed and remanded for new trial. In either case the order will be without costs."

The supreme court of Kansas has passed on this identical question on the Federal Employer's Liability Act in the case of *Saar v. Atchison, T. & S. F. R. Y. Co.*, 155 Pac. 954, and in the opinion the court says:

"The defendant also contends that the findings of the jury as to the contributory negligence of the deceased are inconsistent with the general verdict because the verdict was reduced by only \$100 on account of the negligence of the deceased, while the verdict returned in favor of the plaintiff, after making that reduction, was for \$9,000.00. Section 3 of the Federal Employer's Liability Act, provides that:

"The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

"If the deceased was guilty of contributory negligence, his negligence must have been more than a one ninety-first part of all the negligence that caused his injury. That

amount would have been so small as to render it not worthy of notice. Either the deceased was not negligent, or, if he was negligent, his negligence contributed substantially to his injury. There is nothing to indicate passion or prejudice on the part of the jury. Under these circumstances, a new trial must be ordered or the judgment must be reduced.

"In many of the states appellate courts have adopted the practice, where the damages are excessive, but the plaintiff is entitled to something substantial, of indicating the excess, and of giving or directing the trial court to give the plaintiff the option to remit the excess and allow him to make judgment for the residue. Such action on the part of the appellate court is no invasion of the province of the jury, or of the rights of the defendant. *Mo. Pac. Ry. Co. v. Dwyer*, 36 Kan. 58, 74, 12 Pac. 352, 362.

"See also *U. P. Ry. Co. v. Mitchell*, 56 Kan. 324, 331, 43 Pac. 244; *Railway Co. v. Brandon*, 77 Kan. 612, 95 Pac. 573; *Telegraph Co. v. Bodkin*, 79 Kan. 792, 797, 101 Pac. 652; *Davis v. Railway Co.*, 81 Kan. 505, 508, 106 Pac. 288; *Yard v. Gibbons*, 95 Kan. 802, 814, 149 Pac. 422. Other cases are *W. & C. Ry. Co. v. Gibbs*, 47 Kan. 274, 27 Pac. 991; *Frankhouser v. Cannon*, 50 Kan. 621, 32 Pac. 379; *Dennis v. Benfer*, 54 Kan. 527, 38 Pac. 806; *Railway Co. v. Meyer*, 58 Kan. 305, 49 Pac. 89; *Railway Co. v. Turley*, 71 Kan. 256, 80 Pac. 605; *Argentine v. Bender*, 71 Kan. 422, 80 Pac. 935; *Francis v. Brock*, 80 Kan. 100, 102 Pac. 472.

"If the plaintiff will consent, a judgment will be entered in her favor for \$6,000 with interest from the date of the original judgment; otherwise, a new trial will be ordered."

We do not think it strange that the jury deducted nothing from its verdict for the negligence of deceased, the reason being that the negligence of the Railway Company was so gross and that of the deceased so slight in comparison that the jury may have concluded that the effect of deceased's negligence on the accident was negligible.

The trains were being spaced, and deceased knew of that fact. He knew that the severity of the storm had extinguished the head lights on the engine. He knew that he could not see the lantern in the place of the head light any distance. He knew that should he proceed down the track facing the storm, in an attempt to flag the train, he could not see or hear the approaching train, and in the event he met the train, in all human probability he would have been run down and killed. He did not know that the head-end of his train had reached Mile Post 426. He could not hear the whistle of the engine when a flagman was whistled out.

Under all of this evidence can it be said that deceased's alleged negligence contributed to the accident to any appreciable extent?

In the case at bar the trial court instructed the jury that the deceased was guilty of contributory negligence.

In *Phillips v. Union Pacific R. Co.*, 100 Neb. 157, the trial court submitted the question of Phillip's, the deceased's negligence, to the jury. Phillips was Cradit's conductor, and they were both killed in the caboose by the accident. The evidence in the case at bar was read to the jury in the Phillips case, and the evidence was identical in each case except as to the measure of damages.

The supreme court affirmed the district court in submitting the question of Phillips' negligence to the jury. When these men accustomed to the study of these questions change their minds in regard to the negligence of the deceased, surely the jury may be presumed to have found that under the evidence deceased's negligence was so slight as not to be entitled to consideration.

There is nothing more difficult in determining the amount of the remittitur in this case than in determining the amount of the remittitur in any other personal injury case. In all personal injury cases the plaintiff is entitled to recover

for pain and suffering of the injured party together with other elements of damages, all covered in a general verdict. The amount allowed for these various items the court does not know and has no method of determining, and if a verdict can be lawfully reduced by a remittitur in those cases it clearly can in the case at bar.

Plaintiff in error in its brief relies on the case of *N. Y. C. & St. L. R. Co. v. Niebel*, 214 Fed. 952. This case is not in point for the reason that the trial court erred in instructing the jury. He instructed that the widow was entitled to recover as an element of damages for the loss of her husband's companionship, association and home-ties. This the court held was error, and because there was error in the record the court held that it could not be cured by requiring the plaintiff to file a remittitur.

We call attention to the fact that this decision was laid down by the Circuit Court of Appeals of the 6th district, that being the district which itself entered a remittitur in the case heretofore cited, wherein the jury failed to make reductions for the deceased's negligence, and yet in this case last cited the court is careful to say:

"In view of the manifest merit of the practice, we are not prepared to hold that it may never be adopted in any case where the verdict is based on these indeterminate elements; it may sometimes clearly enough appear from the whole record that the damage resting on the erroneous foundation cannot be more than a certain amount, and that there can be no injustice in providing that the verdict may stand if the plaintiff will remit that amount."

VII.

Jury not required to apportion damages between beneficiaries.

It has been decided by this court that the jury are not required to apportion the damages between the beneficiaries.

In *Central Vermont Ry. Co. v. White*, 238 U. S. 507, this question was before the court, and the court held:

"A general verdict for the plaintiff may be returned by the jury in an action brought by the administratrix under the Federal Employer's Liability Act for the benefit of the widow, and minor children of the deceased employee, without apportioning the damages between the beneficiaries."

VIII.

The court did not err in giving instruction No. 10 to the jury.

This instruction is criticized by the plaintiff in error because in this instruction the court instructed the jury that the beneficiaries, the widow and minor children of the deceased Charles M. Cradit, were entitled to such sum as will compensate them for the pecuniary loss, if any they may have suffered, by reason of the death of said Charles M. Cradit.

In the other instructions given by the court, the jury were instructed as to the elements which constituted the damages for which the plaintiff was entitled to recover. Plaintiff in error contends that this instruction authorized the jury to award damages "For such pecuniary loss as the beneficiaries may suffer in the future." We cannot construe the instruction in this manner, and we do not think it is possible so to construe it.

We do not believe that there has been error committed in the trial of this action prejudicial to the plaintiff in error, and we submit that the judgment of the supreme court of the state of Nebraska should be affirmed.

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Dismissed.

UNION PACIFIC RAILROAD COMPANY *v.* HAD-
LEY, ADMINISTRATOR OF CRADIT.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 174. Argued March 7, 1918.—Decided March 18, 1918.

If the defendant's conduct, viewed as a whole, warrants a finding of negligence, the trial court may properly refuse to charge concerning each constituent item mentioned by the declaration, and leave the general question to the jury.

330.

Opinion of the Court.

The fact that a brakeman, who was killed by a rear-end collision while in the caboose of a standing train, would have escaped if he had been at his post to give warning, as his duty required, does not make his neglect the only proximate cause of his death, if the collision was due also to negligent operation of the train coming from behind. The case is within the terms of Employers' Liability Act, § 1.

In an action under the Employers' Liability Act, where the evidence is such as to justify the jury in treating the employee's contributory negligence as slight, or inconsequential in its effects, the jury may properly find that nothing substantial should be deducted on account of it from the damages; and the fact that the verdict is excessive will not warrant an assumption that, in making such finding, the jury disobeyed the court's instructions on apportionment.

Where the state trial and supreme courts cut down an excessive verdict upon the assumption that the excess was due to the jury's failure to follow instructions on diminution of damages for contributory negligence, *held*, the assumption not being justified by the record, that their action did not invade the province of the jury under the Federal Employers' Liability Act, but was merely in exercise of their power to require a remittitur.

99 Nebraska, 349, affirmed.

THE case is stated in the opinion.

Mr. N. H. Loomis, with whom *Mr. A. G. Ellick* was on the briefs, for plaintiff in error.

Mr. John J. Halligan, with whom *Mr. Wesley T. Wilcox*, *Mr. C. Petrus Peterson*, *Mr. Robert W. Devoe* and *Mr. Joseph M. Swenson* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action under the Federal Employers' Liability Act of April 22, 1908, c. 140, 35 Stat. 65, for causing the death of Cradit, the plaintiff's (the defendant in error's) intestate. The case was brought to this Court before the Act of September 6, 1916, c. 448, 39 Stat. 726,

and with the exception of one or two matters that need a word, presents only the ordinary questions of negligence that it is not our practice to discuss at length.

The deceased was a brakeman on an eastbound freight train known as Extra 504 East. At Dix, in Nebraska, it was overtaken by another eastbound train known as Extra 501 East. There is a single track from Dix to Mile Post 426, 17 miles distant, and train 504 went ahead to this latter point. Train 501 followed for about half the distance to Potter and was held there until 504 had reached Mile Post 426, seven miles further on, when 501 was started on again, leaving its conductor there. But an Extra 510 West had broken down at Mile Post 426 and the train dispatcher at Sidney, about twelve miles still further east, ordered train 504 to take the disabled engine of 510 back to Sidney. The engineer asked the dispatcher to allow 504 to go on and to let 501, when it came up, take back the engine of 510, but it was refused. No. 501 came up, ran into 504 and killed Cradit and some others. The plaintiff says that the accident was due to at least contributory negligence of the railroad—the defendant that it was not negligent, that Cradit would not have been killed if he had done his duty and had gone back to warn the following train by lights, torpedoes, &c., instead of remaining in the caboose, as he did, and that this was the proximate cause of his death.

On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question. We are not

left to the mere happening of the accident. There were block signals working on the road that gave automatic warning of danger to 501, and which it was negligent to pass, seen or unseen, as the engine crew knew where they were and that another train was not far ahead. There was a snow storm raging which the jury might have found to have been of unprecedented violence, and it was open to them to find in view of circumstances unnecessary to detail that the dispatcher ought not to have sent out Extra 510 West as he did and that he was grossly wrong in not allowing 504 to come in and in not leaving it to 501 to bring back the disabled engine. It might have been found improper to leave the conductor of 501 at Potter. It is superfluous to say more upon this point.

But it is said that in any view of the defendant's conduct the only proximate cause of Cradit's death was his own neglect of duty. But if the railroad company was negligent it was negligent at the very moment of its final act. It ran one train into another when if it had done its duty neither train would have been at that place. Its conduct was as near to the result as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit rather than enquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not "result in part from the negligence of any of the employees" of the road. Act of April 22, 1908, c. 149, § 1, 35 Stat. 65. In *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444, it appeared that the only negligence connected with the death was that of the brakeman who was killed.

The Court after instructing the jury that Cradit assumed the ordinary risks of his employment, but not extraordinary ones, in a form that is not open to criticism here, instructed them further that he was guilty of con-

tributory negligence, and that, under the statute, if the jury found it necessary to consider that defence, his negligence was to go by way of diminution of damages in proportions explained. The jury in answer to a question found that nothing should be deducted for the negligence of the deceased, and found a verdict for \$25,000, which was cut down to \$15,000 by the trial Court, and to \$13,500 by the Supreme Court. There were intimations that the jury disregarded the instructions of the Court and on that footing the defendant claims the right to a new trial in order that the jury may determine the proper amount to be deducted, since that was a matter that the Court had no right to decide. But however the belief that the jury had disregarded the instructions may have influenced the mind of the Court, we perceive no legal warrant for the assumption. The account of the weather and other circumstances on the plaintiff's side made it possible for the jury to believe that Cradit's duty was so nearly impossible of performance that no substantial allowance should be made on that account. It does not appear that his superior, the conductor, who was in the caboose with him, required him to perform the task. And since the finding was possible on the evidence it cannot be attributed to disregard of duty. The Court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high. Beyond the question of attributing misconduct to the jury we are not concerned to inquire whether its reasons were right or wrong.

Judgment affirmed.